Supreme Court, U.S.
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No. 92-702

In the
Supreme Court of the United States
October Term, 1992

STATE OF MISSOURI,

Petitioner,

v.

VORNELL PARKER,

Respondent.

APPENDIX
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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Appendix

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	Appeal Nos. 58019 & 59565
vs.	)	
	)	
VORNELL PARKER,	)	
	)	
Appellant.	)	
	)	
	)	

APPEAL TO THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT FROM THE CIRCUIT COURT OF THE
CITY OF ST. LOUIS

Division No. 17

The Honorable Daniel T. Tillman, Judge

(Trial and Post-Conviction)

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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STATE OF MISSOURI v VORNELL PARKER
APPEAL NOS. 58019 & 59565

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JURISDICTIONAL STATEMENT

Vornell Parker, the appellant, was convicted of possession of cocaine, Section 195.020, R.S.Mo. 1986 and sentenced to seven years imprisonment after a jury trial in the Circuit Court of the City of St. Louis before the Honorable Daniel T. Tillman. Following the noted conviction, Vornell filed a Rule 29.15 motion which was also heard before Judge Tillman and overruled. The present matter is a consolidated appeal and does not involve any of the matters reserved for the jurisdiction of the Supreme Court of Missouri. Jurisdiction resides in this Court the Missouri Court of Appeals, Eastern District. Article V Section 3, Mo. Const. (as amended 1982); Section 477.050 R.S.Mo., 1986.

STATEMENT OF FACTS

Vornell Parker, the appellant was charged by information with possession of cocaine Section 195.020, RSMo. 1986. (L.F. 63-64).[1] The information alleged Vornell was a prior and persistent offender and at trial the Court so found (L.F. 63-64; Tr. 173). Following a jury trial, Vornell was convicted as charged and sentenced to seven years imprisonment (L.F. 23-24).

When voir dire concluded, defense counsel moved to quash the jury panel relying on Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Respondent removed five of the ten eligible black venirepersons by peremptory challenge (Tr. 94). The Court, however, did not require the prosecutor to provide race neutral explanations for why each of the black venirepersons was stricken. (Tr. 94-95).

The evidence presented by respondent was as follows. A confidential informant told Detectives Will and Swederski cocaine was being stored at 5306 Vera Street[2] by Vornell and his brother Aaron Parker (Tr. 125, 149-50). The informant reported Vornell and Aaron resided next door to the house where the cocaine was being stored (Tr. 125). Detectives Will and Swederski participated in a surveillance of the Vera Street address for three weeks on six occasions. (Tr. 126, 138, 150).

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[1] The record on appeal will be denominated as follows: 1) Trial Transcript (Tr.); 2) Trial Legal File (L.F.); 3) Post-Conviction Transcript (P.C.R.Tr.); and 4) Post-Conviction Legal File (P.C.R.L.F.).

[2] The transcript contains inconsistent references to the street address in question with references being to both 5306 and 5603 Vera Street (See, e.g., Tr. 113-14, 129).

On March 3, 1989, Will obtained a search warrant which was executed that same day (Tr. 127-28). When Swederski knocked on the door of the residence a black male opened a drape and allegedly began to flee (Tr. 130). Will forced the door open with a sledgehammer (Tr. 130). Once inside, Will and Swederski chased Vornell through the living room into the kitchen (Tr. 131, 152). The Officers allegedly observed Vornell drop something behind the refrigerator (Tr. 153). From behind the refrigerator Will seized three clear plastic bags containing a white powdery substance (Tr. 154). At trial, the three bags were denominated as Exhibit 1 and a police chemist stated each bag contained cocaine (Tr. 154, 159, 165).

When the police entered, Aaron Parker and Reginald Walker were sitting at the kitchen table (Tr. 144). Found on the kitchen table was a plastic bag containing white powder which was identified at trial as Exhibit 2 (Tr. 155). The same police chemist indicated Exhibit 2 contained baking soda (Tr. 164).

During the defense case, several witnesses testified on behalf of Vornell. Joseph Barnes and his mother, Maggie Barnes, live at 5306 Vera (Tr. 179-80). When the police entered the Barnes' residence, Joseph was upstairs asleep. (Tr. 180-81). After the police entered, Joseph was taken downstairs and handcuffed (Tr. 181). Joseph did not see any cocaine in the house (Tr. 184). More particularly, Joseph neither saw the police seize any cocaine nor was he shown any cocaine by the police (Tr. 184-85). Additionally, Joseph stated he did not permit anyone to store cocaine at his house (Tr. 185).

Jack Ford indicated he was at the Barnes' residence the evening in question along with Vornell, Aaron Parker, Reginald Walker, and Marilyn (Aaron Parker's girl-friend) (Tr. 194). The Barnes' residence was a place Ford frequented for purposes of socializing which included consuming alcoholic beverages (Tr. 194). Ford was in the kitchen drinking when the police entered the Barnes' home (Tr. 192). Like Joseph Barnes, Ford neither saw any cocaine nor did he observe the police seize any cocaine (Tr. 194).

Reginald Walker recounted he was in the kitchen drinking a beer when the police entered the premises (Tr. 205-06). In the same manner, as Joseph Barnes and Ford, Walker stated no one possesed any cocaine and the police did not recover any quantities of that drug (Tr. 208-09).

Following the noted conviction, Vornell filed a pro se 29.15 motion (P.C.R.L.F. 1-8). Through appointed counsel an amended motion was filed (P.C.R.L.F. 13-19). The amended motion, in pertinent part, alleged counsel was ineffective for failing to preserve for appellate review claims of error relating to the prosecutor's closing argument and the failure of the trial court to order a mistrial when a venireperson made statements indicating familiarity with Vornell's criminal record (P.C.R.L.F. 13-15). An evidentiary hearing was conducted on November 16, 1991. The motion court enterd Findings of Fact and Conclusions of Law overruling the motion on November 30, 1990 (P.C.R.L.F. 26-29).

From the underlying conviction and the overruling of the post-conviction motion this appeal followed.

POINT RELIED ON

I.

THE TRIAL COURT ERRED WHEN IT FAILED TO REQUIRE RESPONDENT TO PROVIDE RACE NEUTRAL EXPLANATIONS FOR ITS EXERCISE OF FIVE OF ITS SIX PEREMPTORY CHALLENGES AGAINST BLACK VENIREPERSONS BECAUSE IT DEPRIVED VORNELL PARKER OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT HE WAS PRECLUDED FROM ESTABLISHING THE CHALLENGES WERE RACIALLY MOTIVATED IN VIOLATION OF HIS RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITIUTION AS PROVIDED FOR UNDER BATSON V. KENTUCKY, AND ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION. IN ORDER TO REMEDY SUCH ERROR, THIS CAUSE SHOULD BE REMANDED FOR A HEARING WHICH INCLUDES RESPONDENT PROVIDING REASONS FOR EACH OF ITS CHALLENGES AGAINST BLACK VENIREPERSONS.

State v. Robinson, No. 55056 (Mo.App., E.D. June 18, 1991);

State v. Pullen, No. 56820 (Mo.App., E.D. June 18, 1991);

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986);

Avery v. Georgia, 345 U.S. 539, 73 S.Ct. 891 (1953);

Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d (1985);

U.S. Const. Amends XIV; and

Mo. Const. Article I, Sections 2 and 10.

II.

THE TRIAL COURT PLAINLY ERRED WHEN IT FAILED TO DECLARE A MISTRIAL WHEN THE PROSECUTOR ARGUED VORNELL PARKER SHOULD BE CONVICTED OF POSSESSION OF COCAINE AS HE WAS A DRUG DEALER BECAUSE THIS ARGUMENT DEPRIVED VORNELL OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT SUCH ARGUMENT APPEALED TO THE JURY'S PASSION AND PREJUDICES AS REFLECTED IN SOCIETY'S SPECIAL DISDAIN FOR DRUG DEALERS AND A CONVICTION FOR POSSESSION OF COCAINE WAS OBTAINED BY THE PROSECUTOR INJECTING HIS VIEW VORNELL WAS A DRUG DEALER. ALTERNATIVELY, IF THIS COURT CONCLUDES SUCH ARGUMENT DOES NOT CONSTITUTE PLAIN ERROR THEN THE MOTION COURT CLEARLY ERRED WHEN IT FOUND VORNELL WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18 OF THE MISSOURI CONSTITUTION WHEN COUNSEL FAILED TO PRESERVE THIS MATTER FOR REVIEW. A REASONABLY COMPETENT ATTORNEY UNDER SIMILIAR CIRCUMSTANCES WOULD HAVE OBJECTED TO THE PROSECUTOR'S ARGUMENT AND PRESERVED THIS CLAIM FOR REVIEW. VORNELL WAS PREJUDICED BECAUSE HAD THE CLAIM BEEN PRESERVED HE WOULD BE ENTITLED TO A NEW TRIAL.

State v. Hornbuckle, 769 S.W.2d 89 (Mo. banc), cert. denied, ___U.S.___, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989);

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984);

Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987);

Williams v. State, 760 S.W.2d 200 (Mo.App., E.D. 1988);

U.S. Const. Amends VI and XIV;

Mo. Const. Article I, Sections 10 and 18; and

Supreme Court Rule 29.12

III.

THE TRIAL COURT PLAINLY ERRED AND MANIFEST INJUSTICE RESULTED WHEN IT FAILED TO DECLARE A MISTRIAL FOLLOWING A STATEMENT BY VENIREPERSON JOHN SHEPHERD HE HAD BEEN EMPLOYED AT THE WORK-HOUSE FOR NINETEEN YEARS AND THOUGHT HE REMEMBERED SEEING VORNELL PARKER THERE BECAUSE IT DEPRIVED VORNELL OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT SHEPHERD'S STATEMENTS INFORMED THE PANEL OF VORNELL'S PRIOR CRIMINAL RECORD A MATTER WHICH IS INHERENTLY PREJUDICIAL. ALTERNATIVELY, IF THIS COURT CONCLUDES THIS MATTER DOES NOT RISE TO THE LEVEL OF PLAIN ERROR THEN THE MOTION COURT CLEARLY ERRED IN FINDING VORNELL WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18 OF THE MISSOURI CONSTITUTION. A REASONABLY COMPETENT ATTORNEY UNDER SIMILIAR CIRCUMSTANCES WOULD HAVE REQUESTED A MISTRIAL ON THE GROUNDS NOW URGED TO CONSTITUTE PLAIN ERROR. VORNELL WAS PREJUDICED BECAUSE IF THE CLAIM HAD BEEN PRESERVED FOR REVIEW HE WOULD BE ENTITLED TO RELIEF.

State v. Reed, 789 S.W.2d 140 (Mo.App., S.D. 1990);

State v. Harrell, 637 S.W.2d 752 (Mo.App., W.D. 1982);

State v. McDonald, 753 S.W.2d 336 (Mo.App., E.D. 1988);

State v. Hornbuckle, 769 S.W.2d 89 (Mo. banc), cert denied, ___U.S.___, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989);

Williams v. State, 760 S.W.2d 200 (Mo.App., E.D. 1988);

Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987);

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

U.S. Const. Amends VI and XIV;

Mo. Const. Article I, Sections 10 and 18; and

Supreme Court Rule 29.12.

ARGUMENT

I.

THE TRIAL COURT ERRED WHEN IT FAILED TO REQUIRE RESPONDENT TO PROVIDE RACE NEUTRAL EXPLANATIONS FOR ITS EXERCISE OF FIVE OF ITS SIX PEREMPTORY CHALLENGES AGAINST BLACK VENIREPERSONS BECAUSE IT DEPRIVED VORNELL PARKER OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT HE WAS PRECLUDED FROM ESTABLISHING THE CHALLENGES WERE RACIALLY MOTIVATED IN VIOLATION OF HIS RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNTIED STATES CONSTITUTION UNDER BATSON V. KENTUCKY, AND ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUION. IN ORDER TO REMEDY SUCH ERROR, THIS CAUSE SHOULD BE REMANDED FOR A HEARING WHICH INCLUDES RESPONDENT PROVIDING REASONS FOR EACH OF ITS CHALLENGES AGAINST BLACK VENIREPERSONS.

Following voir dire respondent exercised five of its six peremptory challenges against black venirepersons. Counsel objected to these challenges on the grounds they violated the mandates of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Despite counsel's objection, the trial court did not require respondent to furnish race neutral explanations for its conduct. The trial court's ruling deprived Vornell Parker of his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and

Article I, Section 10 of the Missouri Constitution because the ruling prevented him from establishing a Batson violation.

In Batson v. Kentucky, 476 U.S. at 96, 106 S.Ct. at 1723, the Supreme Court indicated a defendant can "establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." In order to establish a prima facie case, a defendant must first demonstrate he is a member of a cognizable racial group and the prosecutor has used peremptory challenges to remove from the venire members of the defendant's race. Id. 476 U.S. at 96, 106 S.Ct. at 1723. Second, a defendant is entitiled to "rely on the fact,... that peremptory challenges constitute a jury selection practice that permits "'those to discriminate who are of a mind to discriminate.'" Id. 476 U.S. at 96, 106 S.Ct. at 1723 (quoting Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 892 (1953)). Third, a defendant must show the factors identified in the first and second prong and "any other relevant circumstances" create an inference the prosecutor removed venirepersons of defendant's race because of their race. Id. 476 U.S. at 96, 106 S.Ct. at 1723. After a defendant succeeds in showing a prima facie case challenges were exercised because of the race of the stricken venirepersons the burden shifts to the State to provide race neutral explanations. Id. 476 U.S. at 97, 106 S.Ct. at 1723. When a prima facie case is established, the prosecutor is required to articulate "a neutral explanation related to the particular case to be tried." Id. 476 U.S. at 98, 106 S.Ct. at

1724. Any such explanation must "give a 'clear and reasonably specific' explanation of [the prosecutor's] 'legitimate reasons'...." Id. 476 U.S. at 98 n. 20, 106 S.Ct. at 1724 n. 20. Although Batson provided the burden shifts to the State after the prima facie case is established, the Missouri Supreme Court, in State v. Antwine, 743 S.W.2d 51, 64 (Mo. banc 1987), directed trial judges "to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case...."

The standard for reviewing a Batson challenge is whether the trial court clearly erred in its finding. Id. at 66. A finding is clearly erroneous "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Id. (quoting Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)).

The trial transcript contains only a fleeting discussion of the Batson challenge. That perfunctory treatment was as follows:

> (Whereupon, the following proceedings were held at the bench out of the hearing of the jury panel):
>
> THE COURT: Okay, how many do we have? We had ten, how many did he take off?
>
> MR. NELSON: Took off five.
>
> MS. DAVIS: Five, that's my count too, Your Honor.
>
> THE COURT: That left how many?
>
> MR. NELSON: That left five out of the ten.
>
> THE COURT: It's a Missouri case that holds when you have a number in excess of the population ratio it's not necessary to have a hearing, but if you want me to make him state why he took them off I will do so.

MS. DAVIS: This will be the defense's motion for Batson, the defense moves to quash the entire jury panel on the motion for mistrial on the basis of the state using five of its pre-emptory [sic] strikes to strike black jury members on the basis of race alone, in that there were other jurors similarly situated that could have been struck.

THE COURT: Okay, overruled. You think it's necessary to have a hearing?

MR. NELSON: I am not going to make a record unless you require me to, Judge.

(Whereupon, the following proceedings were held within the hearing of the jury panel):

THE COURT: Okay, to those of you in the jury box, everybody listen up. If I call your number, those of you in the jury box, I want you to have a seat out in the court room.

(Whereupon, the jury and one alternate juror were seated).

(Tr. 94-95) (emphasis added).

The original venire consisted of forty persons and jury selection concluded with the thirtieth venireperson (L.F. 47-52). As noted, during the bench conference respondent exercised five of its six peremptory challenges against blacks and ten black venirepersons were eligible to sit as jurors (See supra Tr. 94-95). Also, the record reveals the black venirepersons excluded were as follows: 1) Larry Harris - #996; 2) Willa Phillips - #158; 3)Keith Buckner - #49; 4) Gwendolyn Brown - #283; and 5) Cynthia Brown - #281 (L.F. 25-26).

Recently, this Court addressed claims Batson remands should be ordered in State v. Robinson, No. 55056 (Mo.App., E.D. June 18, 1991) and State v. Pullen, No. 56820 (Mo.App., E.D. June 18, 1991). In both Robinson and Pullen, this Court ordered the cause remanded for a Batson hearing. A remand was ordered in Pullen

even though the Batson claim was presented as a matter of plain error. Pullen. slip. op. at 4. The Robinson and Pullen cases, like this matter, (see supra) presented circumstances in which the trial court failed to hear the reasons for respondent's challenges even though respondent was called upon to do so. See Robinson, slip op. at 3; Pullen, slip op. at 5. Moreover, as was true in the present matter (see supra), the trial court in Robinson simply had relied upon the final racial composition of the jury. Robinson slip op. at 3. On the present record, it is impossible to determine whether similiarly situated white venirepersons were removed by respondent. Cf. Robinson, slip. op. at 6. The fact a substantial number of black venirepersons remained on the petit jury does not preclude Vornell from pursuing a Batson challenge. See Robinson, slip op. at 5. There is nothing in the record to indicate the trial court was "clearly convinced of a lack of discriminatory intent," see Robinson slip op. at 6, and therefore the trial court should have required respondent to furnish its reasons for striking the five black venirepersons. See Robinson, slip op. at 6. Without any racist comments in the record it is beyond this Court's power to determine whether respondent's challenges were racially motivated Cf. Robinson, slip op. at 6-7.

This Court has not been presented with a sufficient record to determine whether respondent's peremptory challenges were racially motivated in violation of Batson. See supra. Cf. Robinson slip op. at 7. For these reasons, this matter should be remanded for an evidentiary hearing to determine whether

respondent exercised its peremptory challenges in a racially discriminatory fashion.

II.

THE TRIAL COURT PLAINLY ERRED WHEN IT FAILED TO DECLARE A MISTRIAL WHEN THE PROSECUTOR ARGUED VORNELL PARKER SHOULD BE CONVICTED OF POSSESSION OF COCAINE AS HE WAS A DRUG DEALER BECAUSE THIS ARGUMENT DEPRIVED VORNELL OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT SUCH ARGUMENT APPEALED TO THE JURY'S PASSION AND PREJUDICES AS REFLECTED BY SOCIETY'S SPECIAL DISDAIN FOR DRUG DEALERS AND A CONVICTION FOR POSSESSION OF COCAINE WAS OBTAINED BY THE PROSECUTOR INJECTING HIS VIEW VORNELL WAS A DRUG DEALER. ALTERNATIVELY, IF THIS COURT CONCLUDES SUCH ARGUMENT DOES NOT CONSTITUTE PLAIN ERROR THEN THE MOTION COURT CLEARLY ERRED WHEN IT FOUND VORNELL WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSITUTION AND ARTICLE I, SECTION 18 OF THE MISSOURI CONSTITUTION WHEN COUNSEL FAILED TO PRESERVE THIS MATTER FOR REVIEW. A REASONABLY COMPETENT ATTORNEY UNDER SIMILIAR CIRCUMSTANCES WOULD HAVE OBJECTED TO THE PROSECUTOR'S ARGUMENT AND PRESERVED THIS CLAIM FOR REVIEW. VORNELL WAS PREJUDICED BECAUSE HAD THE CLAIM BEEN PRESERVED HE WOULD BE ENTITLED TO A NEW TRIAL.

A. Closing Argument - Plain Error Review

During closing argument, respondent urged the jury to convict Vornell Parker of the possession charge because he was a drug

dealer. The trial court should have sua sponte declared a mistrial because the argument deprived Vornell of his right to due processs as guaranted by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution. Such argument was intended to appeal to the jury's passion and prejudice to the extent they identify with feelings of outrage surrounding drug dealing and the conviction for a possession offense was obtained by injecting the idea Vornell was a drug dealer.

In closing argument respondent argued as follows:

> MR. NELSON: Thank you, Judge. And as Officers Swederski and Will told you "we had to break the door in with the sledge hammer and the door was not demolished." They go in the house and they see this defendant Vornell Parker running through the house. They are four or five feet behind, Vornell gets to the kitchen and throws down this bag of cocaine behind the refrigerator.
>
> Now, Ms. Davis is going to say why would he do that if a whole herd of police officers are on his tail. The reason the defendant throws this down is because there's other people in the kitchen and he doesn't want to be caught with this stuff and it's not even his house which is very, very convenient. I know you folks picked that up, it's very convenient to be dealing or have drugs outside of your house, not even in your own house it's going to be more harder for the state to prove possession. I would admit that, but the state has proven possession because Officer Will personally saw the defendant in possession of these three bags of cocaine and he threw them down behind the refrigerator and the drugs were seized.

(Tr. 225-26) (emphasis added).

Since respondent's argument was not objected to at trial it is reviewable only for manifest injustice under Rule 29.12. Although the argument was not objected to at trial, it was included as an allegation of error in the motion for new trial

(L.F. 27-28). To be entitled to relief under the plain error rule, a defendant must "go beyond a mere showing of demonstrable prejudice to show manifest prejudice affecting his substantial rights." State v. Hornbuckle, 769 S.W.2d 89, 92-93 (Mo. banc), cert. denied, ___U.S.___, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989).

The referenced argument urged the jury to convict Vornell of the possession offense because he was a drug dealer. Vornell was not charged with a distribution offense. Instead, respondent elected to proceed on the possession charge but at the same time respondent sought to obtain a conviction for possession by injecting argument Vornell was a drug dealer. This argument was intended to appeal to the jury's passion and prejudice to the extent they share feelings of outrage towards drug dealers. For these reasons, the trial court should have sua sponte declared a mistrial and the failure to do so resulted in manifest injustice.

B. Ineffective Assistance of Counsel - Failure to Preserve Closing Argument Claim

If this Court concludes the referenced closing argument did not result in manifest injustice then the motion court clearly erred when it rejected the claim counsel's failure to preserve this matter for review denied Vornell his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 18 of the Missouri Constitution. Appellate review of the overruling of a motion for post-conviction relief is limited to determing whether the findings, conclusions, and judgment are clearly erroneous. See Williams v. State, 760 S.W.2d 200, 201

(Mo.App., E.D. 1988). Findings and conclusions are clearly erroneous if the appellate court is left with a definite and firm impression a mistake was made. Williams v. State, 760 S.W.2d at 201 (relying on Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987)).

To establish he was denied effective assistance of counsel a defendant must demonstrate counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances and he was prejudiced. Strickland v. Washington 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987). Prejudice occurs when there is a reasonable probability but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 94, 104 S.Ct. at 2068, 80 L.Ed. at 698. Reasonable probability constitutes a probability sufficent to undermine confidence in the outcome. Id.

Prior to trial, defense counsel moved to prohibit respondent from adducing evidence or suggesting Vornell was a drug dealer (See Tr. 109). Additionally, the motion for new trial complains of the fact respondent argued Vornell was a drug dealer (L.F. 27-28). The amended post-conviction motion alleged counsel was ineffective for failing to preserve as an allegation of error respondent's improper argument (P.C.R.L.F. 14-15). During the post-convcition hearing, counsel indicated she recalled the prosecutor did argue Vornell was a drug dealer but failed to object (P.C.R. Tr. 11, 13). Further, counsel conceded in order

for a claim of improper closing argument to be reviewable it must be objected to at trial (P.C.R. Tr. 13). A reasonably competent attorney under similar circumstances would have objected to the noted argument especially when viewed in light of the pre-trial motion to exclude any reference to Vornell being a drug dealer and the inclusion as a ground of error in the motion for new trial respondent's improper argument. Vornell was prejudiced because if this claim of error had been preserved, and not subject to plain error review, he would be entitled to a new trial.

Vornell's conviction should be reversed because respondent's closing argument resulted in manifest injustice. In the alternative, if this Court concludes respondent's closing argument did not rise to the level of manifest injustice then counsel was ineffective for failing to preserve as an allegation of error respondent's improper argument.

III.

THE TRIAL COURT PLAINLY ERRED AND MANIFEST INJUSTICE RESULTED WHEN IT FAILED TO DECLARE A MISTRIAL FOLLOWING A STATEMENT BY VENIREPERSON JOHN SHEPHERD HE HAD BEEN EMPLOYED AT THE WORK-HOUSE FOR NINETEEN YEARS AND THOUGHT HE REMEMBERED SEEING VORNELL PARKER THERE BECAUSE IT DEPRIVED VORNELL OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION IN THAT SHEPHERD'S STATEMENTS INFORMED THE PANEL OF VORNELL'S PRIOR CRIMINAL RECORD A MATTER WHICH IS INHERENTLY PREJUDICIAL. ALTERNATIVELY, IF THIS COURT CONCLUDES THIS MATTER DOES NOT RISE TO THE LEVEL OF PLAIN ERROR THEN THE MOTION COURT CLEARLY ERRED IN FINDING VORNELL WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18 OF THE MISSOURI CONSTITUTION. A REASONABLY COMPETENT ATTORNEY UNDER SIMILIAR CIRCUMSTANCES WOULD HAVE REQUESTED A MISTRIAL ON THE GROUNDS NOW URGED TO CONSTITUTE PLAIN ERROR. VORNELL WAS PREJUDICED BECAUSE IF THE CLAIM HAD BEEN PRESERVED FOR REVIEW HE WOULD BE ENTITLED TO RELIEF.

A. Venireperson Shepherd's Statement - Plain Error Review

In the course of respondent's voir dire, venireperson John Shepherd #177 (L.F. 26) stated he had been employed at the work-house for nineteen-years and he had seen Vornell Parker there. The trial court should have declared a mistrial following the

referenced statement because the statement informed the venire of Vornell's prior criminal history. That statement deprived Vornell of his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution as evidence of prior crimes is inherently prejudicial.

The exchanges in question were as follows:

> MR. NELSON: Okay, thank you. Also indorsed as witnesses in this case -- I am going to read to you a list of these people's names and ask if you are familiar with anyone of these folks. A person by the name of Reginald Walker, okay, he lives over on North Riverview. Anybody feel they know Reginald Walker on Riverview?
>
> VENIREMEN: No.
>
> MR. NELSON: A Joseph Barnes?
>
> VENIREMEN: No.
>
> MR. NELSON: And a Maggie Barnes.
>
> THE COURT: You've got a response.
>
> VENIREMAN: I may have come in contact with a lot of these people. I have been at the work house for nineteen years. I think I even remember him.
>
> THE COURT: Hold it right there. Just sit down. Do you challenge him?
>
> MS. DAVIS: Can we approach?
>
> THE COURT: All you have to do is say "I challenge him," and that's the end of it.
>
> MS. DAVIS: Challenge.
>
> THE COURT: Sir, stand up. Get your things and go back to the jury assembly -- why don't you go home and report back to the jury assembly room tomorrow morning at 9:30, and tell Harvey that Judge Tillman said not to put you on a criminal jury.
>
> VENIREMAN: All right, sir.

(Whereupon, the following proceedings were held out of the hearing of the jury panel):

MS. DAVIS: Your Honor, at this time I think I have to move for a mistrial because I believe that would comment on my defendant's right to testify.

THE COURT: He didn't say nothing about that. That will be denied. All right you can cover that on voir dire.

(Tr. 13-14).

While counsel requested a mistrial during voir dire on the grounds Shepherd's statements constituted a "comment on [Vornell's] right to testify" (Tr. 14), the motion for new trial asserts a mistrial should have been granted because Shepherd's statements informed the entire venire of Vornell's prior criminal record (L.F. 26). Since the grounds asserted in the motion for new trial differ from those raised at trial this matter is reviewable only under the plain error/manifest injustice standard of Rule 29.12. Once again in order to obtain relief, as a matter of plain error, a defendant must "go beyond a mere showing of demostrable prejudice to show manifest prejudice affecting his substantial rights." State v. Hornbuckle, 769 S.W.2d 89, 92-93 (Mo. banc), cert. denied, ____U.S.____, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989).

The burden of demonstrating the entire venire was prejudiced by a statement made by a venireperson is allocated to the defendant. State v. Reed, 789 S.W.2d 140, 141 (Mo.App., S.D. 1990). Whether a panel should be dismissed is committed to the discretion of the trial court. Id. When a venireperson makes prejudicial or biased statements disqualification of the entire panel is not required unless those statements "were 'so

inflammatory and prejudicial that it can be said that a right to a fair trial has been infringed."' Id. (quoting State v. Harrell, 637 S.W.2d 752, 757 (Mo.App., W.D. 1982)). See also, Smith v. McDonald, 753 S.W.2d 336, 338 (Mo.App., E.D. 1988) (personal injury action). Vornell's right to a fair trial was infringed because venireperson Shepherd informed the venire of Vornell's prior criminal record. Those who served as jurors would not otherwise have learned of Vornell's prior criminal history. Undoubtedly, the benefit sought to be obtained from Vornell not testifying, the jury not learning of his prior criminal record, was rendered meaningless because of Sheperd's statements. Shepherd's statements were so inflammatory and prejudicial a mistrial should have been declared.

B. Ineffective Assistance of Counsel - Failure to Request Mistrial On Grounds of Revealing Prior Criminal Record

If this Court decides the comments of venireperson Shepherd did not result in manifest injustice then the motion court clearly erred when it overruled the allegation counsel's failure to preserve for review the grounds now advanced for granting a mistrial deprived Vornell of his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 18 of the Missouri Constitution. This Court's review is limited to determining whether the motion court clearly erred. Williams v. State, 760 S.W.2d 200, 201 (Mo.App., E.D. 1988). The motion court's Findings and Conclusions are clearly erroneous if this Court is left with a definite and firm impression a mistake was

made. Id. at 201. (relying on Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987)).

As already noted, in order for a defendant to establish he was denied effective assistance of counsel he must demonstrate counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances and he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987). Again, prejudice occurs when there is a reasonable probability but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 94, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. Reasonable probability constitutes a probability sufficient to undermine confidence in the outcome. Id.

A reasonably competent attorney under similar circumstances would have requested, during voir dire, a mistrial on the gounds asserted in the motion for new trial - Shepherd's statements informed the other venirepersons of Vornell's prior criminal record. The fact a reasonably competent attorney under similar circumstances would have objected during voir dire on the grounds Shepherd had informed the venire of Vornell's criminal record is evidenced by the fact the motion for new trial included this grounds (L.F. 26-27). Moreover, at the post-conviction hearing counsel conceded the grounds advanced in the motion for new trial differed from those at trial and thereby resulted in the allegation in the motion for new trial not being preserved for

review (P.C.R Tr. 9-11). Vornell was prejudiced because had the grounds for granting a mistrial, now advanced and in the motion for new trial, been presented during voir dire he would be entitled to a new trial.

Vornell's conviction should be reversed because the trial court plainly erred when it failed to declare a mistrial when venireperson Shepherd informed the venire of Vornell's prior criminal record. Alternatively, if this Court concludes the grounds now urged for granting a mistrial did not result in manifest injustice then this Court should find Vornell was denied his right to effective assistance of counsel when counsel failed to preserve for review the claim related to Shepherd's statments.

CONCLUSION

For the reasons discussed in Point II and III, Vornell's conviction should be reversed and this matter remanded for a new trial. Alternatively, if this Court concludes Points II and III do not warrant reversal then as discussed in Point I this Cause should be remanded for a hearing to consider whether respondent employed its peremptory challenges in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Respectfully submitted,

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Two copies of the foregoing brief were mailed to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102, on this 28th day of June, 1991.

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No. 58019

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,

Respondent,

vs.

VORNELL PARKER,

Appellant.

Appeal from the Circuit Court of the City of St. Louis,
State of Missouri, Division No. 17
The Honorable Daniel T. Tillman, Judge
(Trial and Post-Conviction)

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for possession of cocaine, §195.020, RSMo 1986, obtained in the Circuit Court of the City of St. Louis and for which appellant was sentenced to seven years imprisonment. An appeal is also taken from the denial of appellant's motion to vacate judgment and sentence under Supreme Court Rule 29.15. The consolidated appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Article V, §3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Vornell Parker, was charged by information on April 20, 1989, with possession of cocaine, §195.020, RSMo 1986 (L.F. 63-64). Appellant was charged as a prior and persistent offender (L.F. 63-64). The cause went to trial before a jury on December 11, 1989, in the Circuit Court of the City of St. Louis, the Honorable H. Daniel T. Tillman presiding (Tr. 1).

The sufficiency of the evidence to sustain appellant's conviction is not in dispute. Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following: In mid-February, 1989, Detective Richard Will received information from a confidential informant that appellant and Aaron Parker were storing a large quantity of cocaine at an apartment next door to their residence (Tr. 125). Detective Will reported this information to his supervisor, Sergeant Donald Henderson, who ordered a three week surveillance of the residence (Tr. 113, 126). During the surveillance, police observed appellant visit the residence next door to his apartment several times, carrying a briefcase which the informant had stated appellant used to transfer drugs (Tr. 126).

The police obtained a search warrant, which they executed on March 3, 1989 (Tr. 114, 128). After knocking and announcing their presence at the front door to no response, Detective Will used a sledge hammer to force open the front door (Tr. 115, 152). As the officers entered, they saw appellant running

towards the kitchen and several other individuals sitting in the living room (Tr. 116). Detective Will chased appellant, and observed appellant toss a bag of cocaine behind the refrigerator as he ran through the kitchen (Tr. 131-132). The search revealed a total of three bags of cocaine, approximately 3.36 grams, as well as one bag of baking soda, commonly used to "cut" cocaine (Tr. 116-118, 164-165).

Appellant did not testify but called three other witnesses in his defense, which was a denial that he had possessed any cocaine (Tr. 178-220). At the close of the evidence, instructions and arguments of counsel, the jury found appellant guilty of possession of cocaine (L.F. 30). On February 9, 1990, the court sentenced appellant as a prior and persistent offender to seven years imprisonment (L.F. 23).

On June 18, 1990, appellant filed a pro se motion to vacate judgment and sentence pursuant to Supreme Court Rule 29.15 (P.L.F. 1-8). The court appointed the special public defender to represent appellant on August 6, 1990, and after being granted one extension appellant filed a first amended motion on September 24, 1990 (P.L.F. 10, 12-17). After conducting an evidentiary hearing, the court issued its Findings of Fact, Conclusions of Law, and Decree on November 30, 1990, denying appellant's motion (P.L.F. 26-29). This appeal follows.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT CLEARLY ERR IN OVERRULING APPELLANT'S BATSON MOTION AND IN NOT REQUIRING THE PROSECUTOR TO GIVE EXPLANATIONS FOR HIS PEREMPTORY STRIKES BECAUSE APPELLANT FAILED TO MAKE A PRIMA FACIE CASE OF ANY RACIALLY DISCRIMINATORY USE OF PEREMPTORY STRIKES BY THE STATE, THE FACTS AND SURROUNDING CIRCUMSTANCES FAILED TO RAISE AN INFERENCE OF DISCRIMINATION AS FIVE BLACKS REMAINED ON THE JURY, THE PROSECUTOR DID NOT USE ALL OF HIS PEREMPTORY STRIKES TO REMOVE BLACKS FROM THE VENIRE AND THE RECORD MADE BY DEFENSE COUNSEL AT TRIAL DOES NOT SUPPORT A FINDING OF IMPROPER DISCRIMINATORY INTENT BY THE PROSECUTOR.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986);

State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987);

State v. Burgess, 800 S.W.2d 743 (Mo. banc 1991);

State v. Hunter, 802 S.W.2d 201 (Mo.App., E.D. 1991);

State v. Robinson, No. 55056, slip op. (Mo.App., E.D. June 18, 1991).

II.

THE TRIAL COURT DID NOT PLAINLY ERR BY FAILING TO DECLARE A MISTRIAL, SUA SPONTE, AND BY ALLOWING THE PROSECUTOR TO ARGUE THAT "IT'S VERY CONVENIENT TO BE DEALING OR HAVE DRUGS OUTSIDE OF YOUR HOUSE" BECAUSE SAID STATEMENTS DID NOT IMPROPERLY INFLAME THE JURORS IN THAT THEY WERE REASONABLE INFERENCES FROM THE EVIDENCE WHICH PERTAINED TO THE ISSUE OF APPELLANT'S GUILT OF THE CRIME OF WHICH HE WAS CHARGED. FURTHERMORE, THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 MOTION BECAUSE TRIAL COUNSEL IS NOT REQUIRED TO MAKE MERITLESS OBJECTIONS.

State v. Groves, 646 S.W.2d 82 (Mo. banc 1983);

State v. Clemmons, 753 S.W.2d 901 (Mo. banc 1988), cert. denied, 109 S.Ct. 380 (1988);

Kayser v. State, 784 S.W.2d 820 (Mo.App., E.D. 1990);

State v. Sidebottom, 753 S.W.2d 915 (Mo. banc 1988), cert. denied, 109 S.Ct. 515 (1988);

State v. Driscoll, 711 S.W.2d 512 (Mo. banc 1986), cert. denied, 479 U.S. 922, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986);

State v. Shelton, 779 S.W.2d 614 (Mo.App., E.D. 1989);

State v. McDonald, 661 S.W.2d 497 (Mo. banc 1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1875, 85 L.Ed.2d 168 (1985);

State v. Henton, 753 S.W.2d 19 (Mo.App., E.D. 1988);

Supreme Court Rule 29.12(b);

Supreme Court Rule 29.15.

III.

THE TRIAL COURT DID NOT PLAINLY ERR WHEN IT FAILED TO DECLARE A MISTRIAL, SUA SPONTE, WHEN VENIREPERSON SHEPHERD STATED THAT HE HAD BEEN EMPLOYED "AT THE WORK HOUSE" FOR NINETEEN YEARS AND THOUGHT HE REMEMBERED APPELLANT BECAUSE APPELLANT HAS FAILED TO PROVE THAT SUCH A COMMENT PREJUDICED THE JURY PANEL IN THAT THE COMMENT DOES NOT REFLECT ANY PRIOR CRIMINAL ACTIVITY OF APPELLANT. FURTHERMORE, THE MOTION COURT DID NOT ERR IN DENYING APPELLANT'S RULE 29.15 MOTION BECAUSE TRIAL COUNSEL IS NOT INEFFECTIVE FOR FAILING TO MAKE A MERITLESS OBJECTION OR MOTION.

State v. Cooper, 719 S.W.2d 20 (Mo.App., W.D. 1986);

State v. Shelton, 779 S.W.2d 64 (Mo.App., E.D. 1989);

Clark v. State, 753 S.W.2d 67 (Mo.App., E.D. 1988);

Supreme Court Rule 29.15.

ARGUMENT

I.

THE TRIAL COURT DID NOT CLEARLY ERR IN OVERRULING APPELLANT'S BATSON MOTION AND IN NOT REQUIRING THE PROSECUTOR TO GIVE EXPLANATIONS FOR HIS PEREMPTORY STRIKES BECAUSE APPELLANT FAILED TO MAKE A PRIMA FACIE CASE OF ANY RACIALLY DISCRIMINATORY USE OF PEREMPTORY STRIKES BY THE STATE, THE FACTS AND SURROUNDING CIRCUMSTANCES FAILED TO RAISE AN INFERENCE OF DISCRIMINATION AS FIVE BLACKS REMAINED ON THE JURY, THE PROSECUTOR DID NOT USE ALL OF HIS PEREMPTORY STRIKES TO REMOVE BLACKS FROM THE VENIRE AND THE RECORD MADE BY DEFENSE COUNSEL AT TRIAL DOES NOT SUPPORT A FINDING OF IMPROPER DISCRIMINATORY INTENT BY THE PROSECUTOR.

Appellant contends that the trial court erred in overruling appellant's **Batson** motion and in failing to require the state to give its reasons for making the strikes it did. Appellant requests this Court to remand the case for an evidentiary hearing so that the state can give the reasons for its peremptory strikes (App.Br. 11).[1]

---

[1]Respondent initially submits that appellant has waived his **Batson** claim because it cannot be determined from the record that the claim was raised prior to appellant's use of his peremptory strikes (Tr. 94-95). An appropriate time to raise a **Batson** claim is after the state has made, and before the defendant makes, peremptory strikes. State v. English, 795 S.W.2d 610, 612 (Mo.App., E.D. 1990). "A **Batson** motion is waived unless timely raised." Id.

Under **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the burden is on the defendant to make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. To establish a prima facie case, the defendant must establish that the prosecutor has exercised peremptory challenges to remove members of the venire on the basis of the race and that this fact and any other relevant circumstances raise an inference that the prosecutor excluded veniremen from the petit jury on account of their race. **State v. Antwine**, 743 S.W.2d 51, 64 (Mo. banc 1987).[2]

Additionally, although **Antwine** required the trial court to always consider the state's explanations for its strikes in determining whether a prima facie case existed, the Supreme Court recently retreated on this requirement. In **State v. Burgess**, 800 S.W.2d 743, 747 (Mo. banc 1991), the court affirmed the trial court's denial of the defendant's **Batson** challenge even though the prosecutor did not give any explanation for his challenges. The court found the defendant failed to show that the fact and surrounding circumstances raised an inference of discrimination. Id. Similarly, this Court, in **State v. Hunter**, 802 S.W.2d 201 (Mo.App., E.D. 1991), held that no prima facie case was made

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[2]In light of **Powers v. Ohio**, 111 S.Ct. 1364 (1991), there no longer is a requirement that the defendant establish that he is a member of a cognizable racial group.

even though the trial court declined to hear the state's reasons for its peremptory strikes. Id. at 202-204. Furthermore, in State v. Robinson, No. 55056, slip op. at 5-7 (Mo.App., E.D. June 18, 1991), while noting that a Hunter situation is extremely rare, ruled that Hunter was still valid even in light of Powers v. Ohio, 111 S.Ct. 1364 (1991).

Respondent submits that in light of the preceding, and based on the record in the case at bar, it is not necessary to remand this case for an evidentiary hearing. At trial, apparently after the jury was selected, defense counsel made a superficial record pursuant to Batson (Tr. 94). The entire record regarding the state's use of its peremptory challenges consists of the following:

> THE COURT: Okay, how many do we have? We had ten, how many did he take off?
>
> MR. NELSON: Took off five.
>
> MS. DAVIS: Five, that's my count, too, Your Honor.
>
> THE COURT: That left how many?
>
> MR. NELSON: That left five out of the ten.
>
> THE COURT: It's a Missouri case that holds when you have a number in excess of the population ratio it's not necessary to have a hearing, but if you want me to make him state why he took them off I will do so.
>
> MS. DAVIS: This will be the defense's motion for Batson, the defense moves to quash the entire jury panel on the motion for mistrial on the basis of the state using five of its pre-emptory [sic] strikes to strike the black jury members on the basis of race alone, in that there were other jurors similarly situated that could have been struck.

THE COURT: Okay, overruled. You think it's necessary to have a hearing?

I am not going to make a record unless you require me to, Judge.

(Tr. 94-95).

Respondent submits that appellant has failed to make a presentable **Batson** claim to this Court, as it is impossible to tell from the record how many of the qualified panel were black, or what the final composition was of the petit jury that actually heard the case.[3] All of the above information is relevant to this Court's determination of whether any inference of discrimination existed. The burden is upon appellant to make a prima facie showing, when he raises the **Batson** motion, that the prosecutor has exercised peremptory challenges on the basis of race. **Batson v. Kentucky**, **supra**. In the present case, appellant has totally failed to meet that burden. Although appellant asserted to the trial court that "there were other jurors similarly situated" (Tr. 95), appellant failed to note to whom he referred.

In any event, in trying to decide if the prosecutor acted with an improper discriminatory motive when he used five of his peremptory strikes to remove individuals who happened to be black, respondent points out the following facts: five blacks remained after the prosecutor used his peremptory strikes; no

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[3]Although appellant cites to the legal file when giving the names of the stricken venirepersons, appellant actually refers to his own motion for new trial filed after the close of this case (App.Br. 14; L.F. 25-26).

facts or circumstances were pointed out to the trial court by defense counsel showing that the prosecutor's strikes were improper in any fashion; the "similarly situated" argument made by defense counsel is unsupported by any factual allegations whatsoever; the questions asked by the prosecutor during voir dire revealed no evidence of improper discriminatory intent; the prosecutor did not use all of his peremptory strikes to remove blacks from the venire; and the prosecutor stated that he was willing to give the reasons for his strikes if ordered to by the court but correctly refrained from doing so in light of the fact that appellant never established a prima facie case.

Therefore, the total absence in the record of any evidence of improper discriminatory intent on the part of the prosecutor supports the finding that appellant had not established a prima facie case. While a **Hunter** situation may only occur in extremely rare instances, this is certainly a case in which the prosecutor is not giving his reasons for his strikes does not require a remand. **Burgess**, supra.

II.

THE TRIAL COURT DID NOT PLAINLY ERR BY FAILING TO DECLARE A MISTRIAL, SUA SPONTE, AND BY ALLOWING THE PROSECUTOR TO ARGUE THAT "IT'S VERY CONVENIENT TO BE DEALING OR HAVE DRUGS OUTSIDE OF YOUR HOUSE" BECAUSE SAID STATEMENTS DID NOT IMPROPERLY INFLAME THE JURORS IN THAT THEY WERE REASONABLE INFERENCES FROM THE EVIDENCE WHICH PERTAINED TO THE ISSUE OF APPELLANT'S GUILT OF THE CRIME OF WHICH HE WAS CHARGED. FURTHERMORE, THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 MOTION BECAUSE TRIAL COUNSEL IS NOT REQUIRED TO MAKE MERITLESS OBJECTIONS.

In appellant's second point, he alleges that the trial court plainly erred "when it failed to declare a mistrial when the prosecutor argued [appellant] should be convicted of possession of cocaine as he was a drug dealer" (App.Br. 17). He claims that the prosecutor's statements "appealed to the jury's passion and prejudices as reflected by society's special disdain for drug dealers" (App.Br. 17).

Respondent notes that appellant has failed to properly preserve this issue for appellate review by failing to object to the portion of the state's argument he now claims was inflammatory and by failing to include this claim in his motion

for a new trial.[4] Therefore, should this Court decide to review this issue, it is only reviewable for "plain error" under Rule 29.12(b). State v. Sidebottom, 753 S.W.2d 915, 919 (Mo. banc 1988), cert. denied, 109 S.Ct. 515 (1988). Under the plain error standard of review, the error complained of "must impact so substantially upon the rights of [a] defendant that manifest injustice or a miscarriage of justice will result if left uncorrected." State v. Driscoll, 711 S.W.2d 512, 515 (Mo. banc), cert. denied, 479 U.S. 922, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986). The burden of demonstrating that the action of the trial court resulted in manifest injustice or a miscarriage of justice is allotted to the defendant. State v. Groves, 646 S.W.2d 82, 83 (Mo. banc 1983).

Moreover, the granting of a mistrial is a drastic remedy, which should only be utilized when there is a grievous error which cannot otherwise be remedied. State v. Shelton, 779 S.W.2d 614, 616 (Mo.App., E.D. 1989). The granting of a mistrial rests largely in the discretion of the trial court since it is in the best position to determine any prejudicial effect from the alleged error. Id.

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[4]Appellant erroneously states that he included this claim as an allegation of error in the motion for new trial (App.Br. 18); the actual allegation of error in appellant's motion stated: "The trial court erred in overruling and denying defendant's objections" to the prosecution's questioning of various defense witnesses (L.F. 27). Obviously, this is a different claim than the one now presented to this Court.

In addition, a trial court has wide discretion in controlling closing argument, with wide latitude accorded counsel in their summaries. **State v. McDonald**, 661 S.W.2d 497, 506 (Mo. banc 1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1875, 85 L.Ed.2d 168 (1985). "The prosecutor has the right to argue reasonable inferences from the evidence which he believes in good faith to be justified." Id. Furthermore, a conviction will be reversed for improper argument "only if it is established the complained of comments had a decisive effect on the jury's determination." **State v. Henton**, 753 S.W.2d 19, 20 (Mo.App., E.D. 1988) (citations omitted). Relief should rarely be granted on assertions of plain error as to closing argument. **State v. Clemmons**, 753 S.W.2d 901, 907-908 (Mo. banc 1988), cert. denied, 109 S.Ct. 380 (1988).

In the case at bar, the evidence showed that Detective Richard Will received information from a confidential informant that appellant was storing large quantities of cocaine at a residence, next door to his apartment (Tr. 125). While conducting surveillance, police observed appellant visit the apartment at 5603 Vera, next door to his apartment, several times carrying a briefcase (Tr. 126). Upon searching the apartment, police discovered three bags of cocaine in appellant's possession, and one bag of baking soda, commonly used to "cut" cocaine (Tr. 116-117, 164-165).

Respondent submits that, from the above evidence, it is clear that the prosecutor could in good faith argue that appellant possessed the cocaine because he was dealing it from

the apartment next door to his residence. It was reasonable for the prosecutor to infer from the amount of the cocaine, the packaging of the cocaine, the presence of the baking soda, and appellant's conduct, that appellant was a drug dealer.

The prosecutor's argument contained reasonable inferences which were drawn in good faith by the prosecutor from the evidence. The fact that appellant was a drug dealer also helped to explain why he possessed cocaine and to prove that he is guilty of possessing it. Thus, appellant's claim must fail.

Appellant's point on appeal also contained a request that "if this Court concludes such argument does not constitute plain error then the motion court clearly erred when it found [appellant] was denied his right to effective assistance of counsel. . . when counsel failed to preserve this matter for review" (App.Br. 17). As set out above, the prosecutor's comments were not improper but rather a reasonable inference from the evidence adduced at trial. "Counsel is not ineffective for failing to make meritless objections." Kayser v. State, 784 S.W.2d 820, 822 (Mo.App., E.D. 1990). Even if a movant succeeds in showing that an objection would have been meritorious, he must also show that the failure to object resulted in a substantial deprivation of the right to a fair trial. Id. Appellant's argument fails on both counts. Consequently, it cannot be said that the trial court clearly erred in denying appellant's claim on this basis, and his second point on appeal should be denied.

III.

THE TRIAL COURT DID NOT PLAINLY ERR WHEN IT FAILED TO DECLARE A MISTRIAL, SUA SPONTE, WHEN VENIREPERSON SHEPHERD STATED THAT HE HAD BEEN EMPLOYED "AT THE WORK HOUSE" FOR NINETEEN YEARS AND THOUGHT HE REMEMBERED APPELLANT BECAUSE APPELLANT HAS FAILED TO PROVE THAT SUCH A COMMENT PREJUDICED THE JURY PANEL IN THAT THE COMMENT DOES NOT REFLECT ANY PRIOR CRIMINAL ACTIVITY OF APPELLANT. FURTHERMORE, THE MOTION COURT DID NOT ERR IN DENYING APPELLANT'S RULE 29.15 MOTION BECAUSE TRIAL COUNSEL IS NOT INEFFECTIVE FOR FAILING TO MAKE A MERITLESS OBJECTION OR MOTION.

In appellant's third point, he asserts that the trial court plainly erred when it failed to declare a mistrial, sua sponte, "following a statement by Venireperson John Shepherd he had been employed at the work house for nineteen years and thought he remembered seeing [appellant] there" (App.Br. 22). Appellant contends that Venireperson Shepherd's statements "informed the panel of [appellant's] prior criminal record" which appellant contends is "inherently prejudicial" (App.Br. 22). Appellant also raises a claim of motion court error for failing to find appellant's trial counsel ineffective in that "a reasonably competent attorney under similar circumstances would have requested a mistrial on the grounds now urged to constitute plain error" (App.Br. 22).

Appellant's first challenge attacks the statement made by Venireperson John Shepherd during voir dire as inherently prejudicial, informing the venire panel of appellant's prior

criminal record. "The trial judge is in the best position to determine the effect on the jury panel of exchanges during voir dire. He therefore has considerable discretion over the process and an appellate court will not interfere unless the record shows a manifest abuse of discretion and a real probability of injury to the complaining party." State v. Cooper, 719 S.W.2d 20, 22 (Mo.App., W.D. 1986); State v. Bannister, 680 S.W.2d 141, 145 (Mo. banc 1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1879, 85 L.Ed.2d 170 (1984).

In the present case, the following exchange occurred during voir dire:

> MR. NELSON: Okay, thank you. Also endorsed as witnesses in this case -- I am going to read to you a list of these people's names and ask if you are familiar with anyone of these folks. A person by the name of Reginald Walker, okay, he lives over on North Riverview. Anybody feel they know Reginald Walker on Riverview?
>
> VENIREMAN: No.
>
> MR. NELSON: A Joseph Barnes?
>
> VENIREMAN: No.
>
> MR. NELSON: And a Maggie Barnes?
>
> THE COURT: You've got a response.
>
> VENIREMAN: I may have come in contact with a lot of these people. I have been at the work house for nineteen years. I think I even remember him.
>
> THE COURT: Hold it right there. Just sit down. . . .

(Tr. 13).

Appellant has completely failed to show how he was prejudiced as a result of the venireperson's statement. It

is in no way clear that Venireperson Shepherd was even referring to appellant by his statement as the previous male individual about which the venire was asked was a Joseph Barnes (Tr. 13). In any event, the comment that he came into contact "with a lot of these people" as a result of being "at the workhouse for nineteen years" (Tr. 13), does no more than indicate that this venireperson may have met someone involved in the case in the course of his employment. It does not give rise to evidence of appellant's criminal record.

The present case is similar to **State v. Cooper**, supra. In **Cooper**, a member of the venire stated that he was a former police officer and that he knew the defendant through his employment. Id. at 22. The defendant's motion for mistrial, based on evidence of other crimes, was overruled. There, as here, "[i]n absence of a more specific description of the circumstances under which the veniremen met [appellant], an equally valid inference may be drawn that the meeting was the product of a non-criminal activity routinely encountered" in the course of employment. Id. at 22. The present case presents an even weaker probability that the conviction of appellant was influenced by the exchange during voir dire as it is not even clear to whom Venireperson Shepherd was referring when he made his comment. Consequently, the trial court did not plainly err in refusing to declare the drastic remedy of a mistrial. **State v. Shelton**, 779 S.W.2d 614, 616 (Mo.App., E.D. 1989).

Appellant next alleges that the motion court clearly erred in denying his Rule 29.15 motion on the basis of counsel's failure to request a mistrial during the above-quoted exchange. Trial counsel is not required to make a frivolous objection or motion. **Clark v. State**, 753 S.W.2d 67, 69 (Mo.App., E.D. 1988). Consequently, the motion court did not clearly err in failing to find appellant's trial counsel ineffective on this basis. Thus, appellant's final point on appeal is without merit and should be denied.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence and the denial of his Rule 29.15 motion should be affirmed.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that two true and correct copies of the above and foregoing brief have been mailed, postage prepaid, this 27th day of August, 1991, to:

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IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 74517
	)	
VORNELL PARKER,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 17
THE HONORABLE DANIEL T. TILLMAN, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Vornell Parker, the appellant, was convicted of possession of cocaine, Section 195.020, RSMo 1986 and sentenced to seven years imprisonment after a jury trial in the Circuit Court of the City of St. Louis before the Honorable Daniel T. Tillman. Following the noted conviction, Vornell filed a Rule 29.15 motion which was also heard before Judge Tillman and overruled. The present matter is a consolidated appeal and this matter was transferred to this Court following opinion in the Eastern District Court of Appeals on order of the Eastern District. Jurisdiction therefore resides in this Court. Article V, Section 10, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

Vornell Parker, the appellant, was charged by information with possession of cocaine, Section 195.020, RSMo 1986 (L.F. 63-64).[1] The information alleged Vornell was a prior and persistent offender and at trial the Court so found (L.F. 63-64; Tr. 173). Following a jury trial, Vornell was convicted as charged and sentenced to seven years imprisonment (L.F. 23-24).

When voir dire concluded, defense counsel moved to quash the jury panel relying on Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Respondent removed five of the ten eligible black venirepersons by peremptory challenge (Tr. 94). The Court, however, did not require the prosecutor to provide any explanations for why each of the black venirepersons was stricken (Tr. 94-95).

The evidence presented by respondent was as follows. A confidential informant told Detectives Will and Swederski cocaine was being stored at 5306 Vera Street[2] by Vornell and his brother Aaron Parker (Tr. 125, 149-50). The informant reported Vornell and Aaron resided next door to the house where the cocaine was being stored (Tr. 125). Detectives Will and Swederski participated in a surveillance of the

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[1] The Record on Appeal will be denominated as follows: (1) Trial Transcript (Tr.); (2) Trial Legal File (L.F.); (3) Postconviction Transcript (PCR Tr.); and (4) Postconviction Legal File (PCR L.F.).

[2] The transcript contains inconsistent references to the street address in question with references being to both 5306 and 5603 Vera Street (See, e.g., Tr. 113-14, 129).

Vera Street address for three weeks on six occasions (Tr. 126, 138, 150).

On March 3, 1989, Will obtained a search warrant which was executed that same day (Tr. 127-28). When Swederski knocked on the door of the residence, a black male opened a drape and allegedly began to flee (Tr. 130). Will forced the door open with a sledgehammer (Tr. 130). Once inside, Will and Swederski chased Vornell through the living room into the kitchen (Tr. 131, 152). The officers allegedly observed Vornell drop something behind the refrigerator (Tr. 153). From behind the refrigerator Will seized three clear plastic bags containing a white powdery substance (Tr. 154). At trial, the three bags were denominated as Exhibit 1 and a police chemist stated each bag contained cocaine (Tr. 154, 159, 165).

When the police entered, Aaron Parker and Reginald Walker were sitting at the kitchen table (Tr. 144). Found on the kitchen table was a plastic bag containing white powder which was identified at trial as Exhibit 2 (Tr. 155). The same police chemist indicated Exhibit 2 contained baking soda (Tr. 164).

During the defense case, several witnesses testified on behalf of Vornell. Joseph Barnes and his mother, Maggie Barnes, live at 5306 Vera (Tr. 179-80). When the police entered the Barnes' residence, Joseph was upstairs asleep (Tr. 180-81). After the police entered, Joseph was taken downstairs and handcuffed (Tr. 181). Joseph did not see any

cocaine in the house (Tr. 184). More particularly, Joseph neither saw the police seize any cocaine nor was he shown any cocaine by the police (Tr. 184-85). Additionally, Joseph stated he did not permit anyone to store cocaine at his house (Tr. 185).

Jack Ford indicated he was at the Barnes' residence the evening in question along with Vornell, Aaron Parker, Reginald Walker, and Marilyn (Aaron Parker's girlfriend) (Tr. 194). The Barnes' residence was a place Ford frequented for purposes of socializing which included consuming alcoholic beverages (Tr. 194). Ford was in the kitchen drinking when the police entered the Barnes' home (Tr. 192). Like Joseph Barnes, Ford neither saw any cocaine nor did he observe the police seize any cocaine (Tr. 194).

Reginald Walker recounted he was in the kitchen drinking a beer when the police entered the premises (Tr. 205-06). In the same manner, as Joseph Barnes and Ford, Walker stated no one possessed any cocaine and the police did not recover any quantities of that drug (Tr. 208-09).

Following the noted conviction, Vornell filed a pro se 29.15 motion (PCR L.F. 1-8). Through appointed counsel an amended motion was filed (PCR L.F. 13-19). The amended motion, in pertinent part, alleged counsel was ineffective for failing to preserve for appellate review claims of error relating to the prosecutor's closing argument and the failure of the trial court to order a mistrial when a venireperson made statements indicating familiarity with

Vornell's criminal record (PCR L.F. 13-15). An evidentiary hearing was conducted on November 16, 1990. The motion court entered Findings of Fact and Conclusions of Law overruling the motion on November 30, 1990 (PCR L.F. 26-29).

From the underlying conviction and the overruling of the postconviction motion this appeal followed.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED WHEN IT FAILED TO REQUIRE RESPONDENT TO PROVIDE ITS EXPLANATIONS FOR THE EXERCISE OF FIVE OF SEVEN PEREMPTORY CHALLENGES AGAINST BLACK VENIREPERSONS BECAUSE IT DEPRIVED VORNELL PARKER OF HIS RIGHT TO DUE PROCESS, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT A PRIMA FACIE CASE WAS DEMONSTRATED AND HE THEREBY WAS PRECLUDED FROM ESTABLISHING THE CHALLENGES WERE RACIALLY MOTIVATED IN VIOLATION OF HIS RIGHT, AND THE EXCLUDED VENIREPERSONS' RIGHTS, TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS PROVIDED FOR UNDER BATSON V. KENTUCKY, AND ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION. IN THE ALTERNATIVE, THE TRIAL COURT ERRED WHEN IT FAILED TO REQUIRE RESPONDENT TO EXPLAIN ITS PEREMPTORY CHALLENGES BECAUSE IT DENIED VORNELL PARKER OF HIS RIGHT TO DUE PROCESS, AS GUARANTEED UNDER THE PREVIOUSLY NOTED CONSTITUTIONAL PROVISIONS, IN THAT THE TRIAL COURT FAILED TO COMPLY WITH STATE V. ANTWINE'S DIRECTIVE THAT RESPONDENT'S EXPLANATIONS BE CONSIDERED AS PART OF THE THIRD ELEMENT OF THE PRIMA FACIA CASE AND THEREBY PREVENTED HIM FROM ESTABLISHING RESPONDENT'S STRIKES WERE RACIALLY MOTIVATED IN VIOLATION OF HIS RIGHT, AND THE EXCLUDED VENIREPERSONS' RIGHTS, TO EQUAL PROTECTION, AS GUARANTEED UNDER THE PREVIOUSLY NOTED CONSTITUTIONAL PROVISIONS.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986);
State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987);
Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364 (1991);
State v. Price, 763 S.W.2d 286 (Mo. App., E.D. 1988);
State v. Lawrence, 791 S.W.2d 729 (Mo. App., E.D. 1990);
State v. Smith, 791 S.W.2d 744 (Mo. App., E.D. 1990);
State v. English, 795 S.W.2d 610 (Mo. App., E.D. 1990);
People v. McDonald, 530 N.E.2d 1351 (Ill. 1988);
People v. Lockhart, 558 N.E.2d 1345 (Ill. Ct. App. 1990);
People v. Henderson, 568 N.E.2d 1234 (Ill. 1990), cert. denied, sub nom. Henderson v. Illinois, ___ U.S. ___, 112 S.Ct. 233 (1991);
Wealot v. Armontrout, 948 F.2d 497 (8th Cir. 1991);
Avery v. Georgia, 345 U.S. 559, 73 S.Ct. 891 (1953);
Akins v. Texas, 325 U.S. 398, 65 S.Ct. 1276;
United States v. Carolene Products, 304 U.S. 144, 58 S.Ct. 778 (1938);
Murchu v. United States, 926 F.2d 50 (1st Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 99 (1991);
Edmonson v. Leesville Concrete Co. Inc., ___ U.S. ___, 111 S.Ct. 2077 (1991);
Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965);
Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859 (1991);
State v. Pullen, 811 S.W.2d 463 (Mo. App., E.D. 1991);
State v. Burgess, 800 S.W.2d 743 (Mo. banc 1990);
Green v. State, 572 So.2d 543 (Fla. Dist. Ct. App.), review denied, 581 So.2d 164 (Fla. 1991);
State v. Neil, 457 So.2d 481 (Fla. 1984);
Dinkins v. State, 566 So.2d 859 (Fla. Dist. Ct. App.), review denied, 576 So.2d 286 (Fla. 1990);
People v. Benson, 271 Cal.Rptr. 715 (Cal. Ct. App. 1990);
State v. Myers, 770 S.W.2d 312 (Mo. App., W.D. 1989);
State v. Adams, 552 S.W.2d 53 (Mo. App., W.D. 1977);
People v. Wheeler, 148 Cal.Rptr. 890 (Cal. 1978);
State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988), cert. denied, 490 U.S. 1113, 109 S.Ct. 3175 (1989);
State v. Robinson, 811 S.W.2d 460 (Mo. App., E.D. 1991);
State v. Crump, 747 S.W.2d 193 (Mo. App., E.D. 1988);
State v. Roper, No. 57805, slip op. (Mo. App., E.D., Jan. 14, 1992);
State v. Gonzales, 808 P.2d 40 (N.M. Ct. App.), cert. denied, 806 P.2d 65 (N.M. 1991);
United States v. Alvarado, 891 F.2d 439 (1989);
United States v. Alvarado, 923 F.2d 253 (2nd Cir. 1991);

Alvarado v. United States, ___ U.S. ___, 110 S.Ct. 2995 (1990);
State v. States, 809 S.W.2d 6 (Mo. App., E.D. 1990);
U.S. Const., Amend. XIV;
Mo. Const., Art. I, Sections 2 and 10; and
Sections 494.480 and 494.485.

II.

THE TRIAL COURT PLAINLY ERRED, RESULTING IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE, BY FAILING TO DECLARE A MISTRIAL WHEN THE PROSECUTOR ARGUED VORNELL PARKER SHOULD BE CONVICTED OF POSSESSION OF COCAINE AS HE WAS A DRUG DEALER BECAUSE THIS ARGUMENT DEPRIVED VORNELL OF HIS RIGHT TO DUE PROCESS, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT SUCH ARGUMENT APPEALED TO THE JURY'S PASSIONS AND PREJUDICES AS REFLECTED IN SOCIETY'S SPECIAL DISDAIN FOR DRUG DEALERS AND A CONVICTION FOR POSSESSION OF COCAINE WAS OBTAINED BY THE PROSECUTOR INJECTING HIS VIEW VORNELL WAS A DRUG DEALER. ALTERNATIVELY, IF THIS COURT CONCLUDES SUCH ARGUMENT DOES NOT CONSTITUTE PLAIN ERROR THEN THE MOTION COURT CLEARLY ERRED WHEN IT FOUND VORNELL WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18 OF THE MISSOURI CONSTITUTION, WHEN COUNSEL FAILED TO PRESERVE THIS MATTER FOR REVIEW. A REASONABLY COMPETENT ATTORNEY UNDER SIMILAR CIRCUMSTANCES WOULD HAVE OBJECTED TO THE PROSECUTOR'S ARGUMENT AND PRESERVED THIS CLAIM FOR REVIEW. VORNELL WAS PREJUDICED BECAUSE HAD THE CLAIM BEEN PRESERVED HE WOULD BE ENTITLED TO A NEW TRIAL.

State v. Hornbuckle, 769 S.W.2d 89 (Mo. banc), cert. denied, ___ U.S. ___, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989);
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987);
Williams v. State, 760 S.W.2d 200 (Mo. App., E.D. 1988);
U.S. Const., Amends. VI and XIV;
Mo. Const., Art. I, Sections 10 and 18; and
Supreme Court Rules 29.12 and 30.20.

III.

THE TRIAL COURT PLAINLY ERRED, RESULTING IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE, WHEN IT FAILED TO DECLARE A MISTRIAL FOLLOWING A STATEMENT BY VENIREPERSON JOHN SHEPHERD THAT HE HAD BEEN EMPLOYED AT THE WORK-HOUSE FOR NINETEEN YEARS AND THOUGHT HE REMEMBERED SEEING VORNELL PARKER THERE BECAUSE IT DEPRIVED VORNELL OF HIS RIGHT TO DUE PROCESS, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT SHEPHERD'S STATEMENTS INFORMED THE PANEL OF VORNELL'S PRIOR CRIMINAL RECORD A MATTER WHICH IS INHERENTLY PREJUDICIAL. ALTERNATIVELY, IF THIS COURT CONCLUDES THIS MATTER DOES NOT RISE TO THE LEVEL OF PLAIN ERROR THEN THE MOTION COURT CLEARLY ERRED IN FINDING VORNELL WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18 OF THE MISSOURI CONSTITUTION. A REASONABLY COMPETENT ATTORNEY UNDER SIMILAR CIRCUMSTANCES WOULD HAVE REQUESTED A MISTRIAL ON THE GROUNDS NOW URGED TO CONSTITUTE PLAIN ERROR. VORNELL WAS PREJUDICED BECAUSE IF THE CLAIM HAD BEEN PRESERVED FOR REVIEW THEN HE WOULD BE ENTITLED TO RELIEF.

State v. Reed, 789 S.W.2d 140 (Mo. App., S.D. 1990);
State v. Harrell, 637 S.W.2d 752 (Mo. App., W.D. 1982);
State v. McDonald, 753 S.W.2d 336 (Mo. App., E.D. 1988);

State v. Hornbuckle, 769 S.W.2d 89 (Mo. banc), cert. denied, ___ U.S. ___, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989);
Williams v. State, 760 S.W.2d 200 (Mo. App., E.D. 1988);
Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987);
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
U.S. Const., Amends. VI and XIV;
Mo. Const., Art. I, Sections 10 and 18; and
Supreme Court Rules 29.12 and 30.20.

ARGUMENT

I.

THE TRIAL COURT ERRED WHEN IT FAILED TO REQUIRE RESPONDENT TO PROVIDE ITS EXPLANATIONS FOR THE EXERCISE OF FIVE OF SEVEN PEREMPTORY CHALLENGES AGAINST BLACK VENIREPERSONS BECAUSE IT DEPRIVED VORNELL PARKER OF HIS RIGHT TO DUE PROCESS, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT A PRIMA FACIE CASE WAS DEMONSTRATED AND HE THEREBY WAS PRECLUDED FROM ESTABLISHING THE CHALLENGES WERE RACIALLY MOTIVATED IN VIOLATION OF HIS RIGHT, AND THE EXCLUDED VENIREPERSONS' RIGHTS, TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS PROVIDED FOR UNDER BATSON V. KENTUCKY, AND ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION. IN THE ALTERNATIVE, THE TRIAL COURT ERRED WHEN IT FAILED TO REQUIRE RESPONDENT TO EXPLAIN ITS PEREMPTORY CHALLENGES BECAUSE IT DENIED VORNELL PARKER OF HIS RIGHT TO DUE PROCESS, AS GUARANTEED UNDER THE PREVIOUSLY NOTED CONSTITUTIONAL PROVISIONS, IN THAT THE TRIAL COURT FAILED TO COMPLY WITH STATE V. ANTWINE'S DIRECTIVE THAT RESPONDENT'S EXPLANATIONS BE CONSIDERED AS PART OF THE THIRD ELEMENT OF THE PRIMA FACIA CASE AND THEREBY PREVENTED HIM FROM ESTABLISHING RESPONDENT'S STRIKES WERE RACIALLY MOTIVATED IN VIOLATION OF HIS RIGHT, AND THE EXCLUDED VENIREPERSONS' RIGHTS, TO EQUAL PROTECTION, AS GUARANTEED UNDER THE PREVIOUSLY NOTED CONSTITUTIONAL PROVISIONS.

Respondent employed five of its seven peremptory challenges to remove eligible black venirepersons. The trial court did not require respondent to explain its challenges. The use of five of seven peremptory challenges against black venirepersons established a prima facie case. By failing to require respondent to explain its challenges, the trial court deprived Vornell Parker of his right to due process, as guaranteed under the State and Federal constitutions, because it prevented him from establishing those challenges were exercised in violation of both his, and the excluded venirepersons', rights to equal protection safeguarded by the State and Federal constitutions.

Alternatively, if this Court concludes a prima facie case was not demonstrated then the trial court deprived Vornell Parker of his right to due process, guaranteed by the State and Federal constitutions, because it did not comply with the Antwine directive in that the State's explanations are to be considered as part of evaluating the third element of the prima facie case. This noncompliance with Antwine prevented Vornell from establishing respondent's challenges violated his, and the stricken venirepersons', rights to equal protection guaranteed by the State and Federal constitutions.

A. The Batson Challenge Was Timely Raised Because It Was Made Before Those Eligible To Serve Were Discharged and the Jury Sworn and Respondent's Objection Now Is Waived Because It Is Untimely

The Batson challenge is properly before this Court because it was made before the venirepersons eligible to serve were discharged. Additionally, the claim was preserved because this Court should find a Batson claim is required to be made before the jury is sworn and that occurred in this matter. In the Court of Appeals, respondent argued Vornell Parker waived his Batson challenge because the claim is required to be raised after respondent makes its peremptory strikes and before the defense exercises its peremptory strikes and the record does not affirmatively demonstrate that occurred (Resp. Br. 8 n.1).

The portion of the record relevant to all issues presented is as follows:

> THE COURT: Okay. Do you have any additional questions, sir?
>
> MR. NELSON: No, Judge.
>
> THE COURT: May the record indicate that we have qualified the required number for the state?
>
> MR. NELSON: Yes.
>
> THE COURT: For the defense?
>
> MS. DAVIS: Yes, sir.
>
> THE COURT: Okay. To those of you not selected or questioned, would you stand. You stand discharged from further service. I would like to thank you and say that you have assisted in the administration of justice even though you were not selected to try this case. There will be some other requests, I do hope you have an

opportunity of hearing a case. Please, feel good about your service, you have rendered a service second to none.

Would you get your things and go back to the jury assembly room on the 8th floor from whence you cometh. Thanks a lot.

Mr. Dix, give your father my regards.

VENIREMAN DIX: I sure will.

THE COURT: The rest of you just relax where you are.

(Tr. 92-93).

. . . . .

THE COURT: Okay, relax where you are. The lawyers are going to make their strikes. We are going to keep thirteen and send the rest back over to the jury assembly room.

(Whereupon, the following proceedings were held at the bench out of the hearing of the jury panel):

THE COURT: Okay, how many do we have? We had ten, how many did he take off?

MR. NELSON: Took off five.

MS. DAVIS: Five, that's my count too, Your Honor.

THE COURT: That left how many?

MR. NELSON: That left five out of the ten.

THE COURT: It's a Missouri case that holds when you have a number in excess of the population ratio it's not necessary to have a hearing, but if you want me to make him state why he took them off I will do so.

MS. DAVIS: This will be the defense's motion for Batson, the defense moves to quash the entire jury panel on the motion for mistrial on the basis of the state using five of its pre-emptory strikes to strike black jury members on the basis of race alone, in that there were other jurors similarly situated that could have been struck.

THE COURT: Okay, overruled. You think it's necessary to have a hearing?

MR. NELSON: I am not going to make a record unless you require me to, Judge.

(Whereupon, the following proceedings were held within the hearing of the jury panel):

THE COURT: Okay, to those of you in the jury box, everybody listen up. If I call your number, those of you in the jury box, I want you to have a seat out int [sic] he courtroom.

(Whereupon, the jury and one alternate juror were seated).

THE COURT: Would the state look at the jurors in the jury box and the juror seated adjacent thereto. Is that the jury selected to try this case?

MR. NELSON: Yes, it is, Judge.

THE COURT: For the defense?

MS. DAVIS: Yes, it is, Judge.

THE COURT: To those of [you] selected to try this case, look to the right of you and look to the left o [sic] you. I want you in that same position throughout the trial of this case. Don't discuss this case among yourselves or permit anyone to discuss it with you. If anybody attempts to do so bring it to my attention at once.

We will take a break now. We treat jurors a little differently that serve in any division that I reside [sic] over. We have a microwave available for you, we have coffee, we have tea, and an icebox down in the jury room. But I don't provide any soda or food. You can only use one styrofoam cup a day, ut [sic] your name of [sic] initials on it or something so you won't waste any cups. This is my donation to the system to try to make your stay as comfortable as possible here.

We will be in recess until I need you. You must go to the jury room at this time. Take them down, Sheriff.

> To those of you not selected, I would like to say that you have assisted in the administration of justice even though you were not selected to try this particular case. Feel good about your service. This is the best method of administering justice. You were selected from the community at random then we go through this selection process.

(Tr. 94-96). Following a motion hearing, the jury and one alternate were sworn (Tr. 110). In order to obtain twenty-seven eligible venirepersons, the selection process extended as far as the thirtieth venireperson (L.F. 48-54). The original venire consisted of forty persons (L.F. 47-52).[3]

The Eastern District Court of Appeals, in dicta, indicated "the better time to raise" a Batson challenge is after the State has made its peremptory challenges and before the defendant makes his peremptory challenges. State v. Price, 763 S.W.2d 286, 289 n.3 (Mo. App., E.D. 1988). That sequence was recommended for several reasons. First, if the State made an improper strike then the Court can prohibit it. Id. Second, the State can be afforded the opportunity to complete its strikes by substituting another venireperson for the one improperly removed. Id. Lastly, losing the entire venire is avoided and thereby judicial time is not unnecessarily expended. Id.

Following Price, the Eastern District found the defendant in State v. Lawrence, 791 S.W.2d 729, 730 (Mo. App., E.D. 1990), waived his Batson challenge because it was

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[3] Those stricken for cause and their replacements were as follows: (1) Modde #486 (replaced by Haselroth #109); (2) Shepherd #177 (replaced by Harris #996); and (3) J. Brown #45 (replaced by G. Brown #283) (L.F. 48, 50, 52; Tr. 3-4, 13-15, 47).

untimely. In Lawrence, the parties had made their peremptory challenges and the Court had dismissed the other eligible venirepersons when the Batson claim was asserted. Id.

Relying on Price and Lawrence, the Eastern District concluded in State v. Smith, 791 S.W.2d 744, 747 (Mo. App., E.D. 1990), that the Batson claim was waived when the challenge was made after the jury was sworn. While so ruling, the Court observed there was no justification for defense counsel waiting until the stricken eligible venirepersons were discharged. Id. The Smith Court noted that if it permitted the challenge to be raised after the jury was sworn, the State could be precluded from ever proceeding against the defendant because jeopardy had attached. Id. For that reason, the Smith Court held a Batson challenge must be made before the jury is sworn and prior to the eligible venirepersons being discharged. Id. at 747-48. Similarly, in State v. English, 795 S.W.2d 610, 612 (Mo. App., E.D. 1990), the Batson challenge was foreclosed because it was not asserted until the eligible venirepersons were discharged.

The reoccurring focus in the Eastern District's cases is the fact that any objection should be made before the eligible venirepersons are discharged and the jury is sworn. The record in this case evidences those standards were satisfied. When the court inquired whether twenty-seven venirepersons had been qualified, the parties indicated

their agreement (Tr. 92). The court then released those individuals who were part of the venire, but were beyond the twenty-seven required for the parties to exercise their peremptory challenges (Tr. 92-93). Next, the court observed the lawyers would make their strikes and those stricken would be directed to return to the jury assembly room (Tr. 94). That was followed by the Batson challenge and the record made thereon (Tr. 94-95). After these matters occurred, the jury and one alternate were seated (Tr. 95). The court then extended its appreciation to those eligible venirepersons who were not selected (Tr. 96). Thereafter, the eligible, but stricken venirepersons, were discharged (Tr. 97). Following a motion hearing, the jury was sworn (Tr. 110). These facts evidence the Batson challenge was made both before the eligible venirepersons were discharged and the jury was sworn and therefore the claim was timely raised. This Court, like the Illinois Supreme Court, should deem a Batson objection as timely if it is made prior to the jury being sworn. See People v. McDonald, 530 N.E.2d 1351, 1356 (Ill. 1988). See also People v. Lockhart, 558 N.E.2d 1345, 1351 (Ill. Ct. App. 1990).

Any objection by respondent to the timeliness of the Batson challenge should itself be deemed waived because it failed to raise its objection in the trial court. In People v. Henderson, 568 N.E.2d 1234, 1246 (Ill. 1990), cert. denied, sub nom. Henderson v. Illinois, ___ U.S. ___, 112 S.Ct. 233 (1991), the defendant failed to make his Batson

challenge until the jury was sworn. Despite that fact, the Illinois Supreme Court reviewed the claim because the State waived its timeliness objection by failing to present it to the trial court. Id. at 1246-47. See also People v. Lockhart, 558 N.E.2d at 1351. Because respondent is presenting its objection to the timeliness of the Batson challenge for the first time on appeal, it should be deemed waived. Cf. Wealot v. Armontrout, 948 F.2d 497, 499 (8th Cir. 1991) (State's failure to make procedural default argument to trial court precluded it from raising it on appeal).

Should this Court conclude the Batson challenge was not timely raised, then plain error review under Rules 29.12 and 30.20 is requested. Even in Lawrence, Smith, and English, where the objections were viewed as untimely, the Eastern District reviewed the claims ex gratia and therefore plain error review should be granted. See State v. Lawrence, 791 S.W.2d at 731; State v. Smith, 791 S.W.2d at 748; State v. English, 795 S.W.2d at 612.

B. Antwine in Light of Hernandez and Burgess

In Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986), the Supreme Court held purposeful racial discrimination in selection of the jury, accomplished through a prosecutor's exercise of peremptory challenges, violates a defendant's right to equal protection. While so holding, the Court indicated a defendant can "establish a prima facia case of purposeful

discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." In order to establish a prima facie case, a defendant must first demonstrate he is a member of a cognizable racial group and the prosecutor has used peremptory challenges to remove from the venire members of the defendant's race. Id. 476 U.S. at 96, 106 S.Ct. at 1723. Second, a defendant is entitled to "rely on the fact, . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Id. (quoting Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 892 (1953)). Third, a defendant must show the factors identified in the first and second prong and "any other relevant circumstances" create an inference the prosecutor removed venirepersons of defendant's race because of their race. Id. 476 U.S. at 96, 106 S.Ct. at 1723. After a defendant succeeds in showing a prima facie case, the burden shifts to the State to provide race neutral explanations. Id. 476 U.S. at 97, 106 S.Ct. at 1723. When a prima facie case is established, the prosecutor is required to articulate "a neutral explanation related to the particular case to be tried." Id. 476 U.S. at 98, 106 S.Ct. at 1724. Any such explanation must "give a 'clear and reasonably specific' explanation of [the prosecutor's] 'legitimate reasons' . . ." Id. 476 U.S. at 98 n.20, 106 S.Ct. at 1724 n.20.

The Court's Batson decision was prompted by the fact that "[b]y compromising the representative quality of the jury, discriminatory selection procedures make 'juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.'" Id. 476 U.S. at 86 n.8, 106 S.Ct. at 1717 n.8 (quoting Akins v. Texas, 325 U.S. 398, 408, 65 S.Ct. 1276, 1281 (1945) (Murphy, J., dissenting)). Cf. United States v. Carolene Products, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 783 n.4 (1938) (suggesting the Court engages in a more searching inquiry to protect "discrete and insular minorities" because the political processes tend to fail to protect these individuals); Murchu v. United States, 926 F.2d 50, 53-55 (1st Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 99 (1991) (claim Irish Americans were excluded in violation of Batson failed to state a cognizable claim because there was nothing to indicate they had been singled out for discrimination in our society). Although Batson provided the burden shifts to the State to provide race neutral explanations after the prima facie case is established, this Court in State v. Antwine, 743 S.W.2d 51, 64 (Mo. banc 1987) implemented Batson and demonstrated its resolve to eliminate the use of racially motivated peremptory challenges by directing trial judges consider prosecutors' explanations as a part of the process of determining whether defendants have satisfied the third element of the prima facie case. This procedure was adopted and flowed naturally from the Court's observation in

Batson that "[i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." Batson v. Kentucky, 476 U.S. at 99 n.4, 106 S.Ct. at 1725 n.4. Accord Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 1374 (1991) (leaving to trial courts to develop rules to ferret out peremptory challenges that are a mask for racial prejudice); Edmonson v. Leesville Concrete Co. Inc., ___ U.S. ___, 111 S.Ct. 2077, 2089 (1991) (trial courts are left to develop evidentiary rules to implement Batson). This Court's directive also was in keeping with Justice White's observations in his concurring opinion in Batson where he endorsed overruling Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Justice White favored overruling Swain because the practice of peremptorily removing blacks from petit juries "remain[ed] widespread." Id. 476 U.S. at 101, 106 S.Ct. at 1725. This Court further evidenced its commitment to eliminating the racially discriminatory use of peremptory challenges in Antwine when it indicated facially legitimate explanations that conceal a discriminatory motive tendered by a prosecutor, after a prima facie case has been established, are not to be tolerated because to do so would render Batson a "charade." State v. Antwine, 748 S.W.2d at 65.

The Supreme Court has revisited Batson on three occasions. In Powers v. Ohio, the Court found a white

defendant had standing to challenge a prosecutor's peremptory removal of black venirepersons. Powers v. Ohio, 111 S.Ct. at 1367.[4] The Court commenced its Powers analysis noting Batson was intended to accomplish multiple goals. Id. at 1368. Those goals are protecting both individual defendants and venirepersons from racial discrimination in the jury selection process. Id. The Court next observed while an individual juror does not have a right to serve on a petit jury, he or she does possess the right not to be excluded because of race. Id. at 1370. Allowing defendants, such as Powers, to assert the third-party rights of stricken venirepersons was viewed as consistent with the jury system's purpose of "impress[ing] upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." Id. at 1372. Finally, in Powers, the Court reasoned defendants have standing to assert the excluded venirepersons' rights because those individuals have little incentive to institute civil actions to vindicate their rights. Id. at 1373.

Subsequently, in Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859, 1867-72 (1991), the Court focused its attention on what may constitute legitimate race neutral explanations for peremptory challenges. Before discussing

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[4] The fact white defendants have standing to raise Batson challenges appears to obviate any need to demonstrate the first element of the prima facie case as enunciated in Batson.

the legitimacy of the prosecutor's explanations, the Court necessarily considered matters related to the prima facie case. The prosecutor, in Hernandez, "did not wait for a ruling on whether [the] petitioner had established a prima facie case of racial discrimination." Id. at 1864. Instead, the prosecutor "volunteered" his explanations for his challenges. Id. Those "volunteered" explanations occurred "without any prompting or inquiry from the trial court." Id. at 1866. As a result, "the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination." Id. Because the prosecutor "volunteered" his explanations, the Court indicated whether defendant made a prima facie showing was rendered moot. Id.

The Court's most recent decision construing Batson is Edmonson v. Leesville Concrete Co. Inc., supra. There, Edmonson, who is black, commenced a negligence personal injury action against Leesville. Edmonson v. Leesville Concrete Co. Inc., 111 S.Ct. at 2080-81. When Leesville exercised two of its three peremptory strikes against blacks, Edmonson relied on Batson to challenge those strikes. Id. at 2081. Relying on Powers, the Court extended Batson's protection to the situation in which a private civil litigant exercises peremptory challenges. Id. at 2081, 2088. In order to so find, the Court first was required to determine private civil litigants are state actors. Id. at 2082-86. That novel finding was grounded in

the Court's concern that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." Id. at 2088. Additionally, the Court was concerned that "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." Id.

Respondent has recently urged the Court of Appeals to transfer cases to this Court because it argues that under Hernandez, this Court, through its decision in Antwine, is compelling respondent to forfeit challenging the existence of a prima facie case. See, e.g., State v. Roper (Mo. App., E.D. #57805) (respondent's rehearing motion); State v. Pullen (Mo. App., E.D. #56820) (Resp. Br. at 13-19). Also, respondent has argued in the Court of Appeals that this Court's decision in State v. Burgess, 800 S.W.2d 743 (Mo. banc 1990) constitutes an overruling of Antwine. Id. The decision in Antwine does not cause respondent to waive any challenges to the prima facie case because what sets this Court's Antwine directive apart from Hernandez is that the prosecutor in Hernandez "volunteered" his explanations without prompting whereas under Antwine the State is required to tender its explanations as part of the third element of the prima facie case. This Court's directive in Antwine is simply a procedure this Court has chosen to implement to accomplish Batson's benevolent purposes of ridding jury selection of racial discrimination. See

Batson, Powers, and Edmonson, supra. It is only the volunteering of explanations under Hernandez which results in waiver.

This interpretation of Hernandez is consistent with case law from at least one other jurisdiction which prior to Batson had adopted, as a matter of its state's constitution, procedures which parallel Batson. The approach followed by another jurisdiction, which also prohibited racially motivated challenges under its constitution prior to Batson, offers a procedural device to resolve any concerns respondent may have regarding waiving the prima facie case. While the Florida Court of Appeals, in Green v. State, 572 So.2d 543, 545 (Fla. Dist. Ct. App. 1990), review denied, 581 So.2d 164 (Fla. 1991)[5] concluded the burden had never shifted to the State to provide race neutral explanations for its challenges, it indicated the then state of the law was that even the volunteering of explanations did not waive the defendant's initial burden. Id. at 545. That Court indicated that if the State can ever be deemed to have waived its objection to the defendant's initial burden, it should be when it volunteers explanations for its challenges. Id. at 545-46 n.1. The Green Court indicated other Florida authority on the subject stood for the proposition the critical factor in finding a waiver by the

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[5] In State v. Neil, 457 So.2d 481, 486 (Fla. 1984), the Florida Supreme Court invoked the Florida Constitution's guarantee to an impartial jury to prohibit racially motivated peremptory challenges. The procedures adopted in Neil closely parallel those of Batson. Id. at 486-87.

State is the volunteering of explanations. Id. at 545-46 n.1 (relying on Dinkins v. State, 566 So.2d 859, 860-61 (Fla. Dist. Ct. App. 1990), review denied, 576 So.2d 286 (Fla. 1990) (Ervin, J., dissenting)).

Before the California Court of Appeals in People v. Benson, 271 Cal.Rptr. 715, 718 (Cal. App. 1990) was the issue of whether a trial court's request for the prosecutor's input or response to a claim that peremptory challenges were racially motivated constituted an implied finding that a prima facie case had been proven.[6] Under the noted circumstances, the California Court concluded the furnishing of reasons by the prosecutor does not constitute an implied finding the necessary prima facie showing was made. Id. at 719. That Court, however, directed its trial courts that to avoid the problems posed by an unintended implication they should state on the record the prosecutor's input is being solicited solely to determine whether the defendant had established a prima facie case. Id. at 723. This Court can similarly direct its trial courts to state on the record they are requesting a prosecutor's input for the limited purpose of determining whether a prima facie case exists as provided under Antwine's directive as to the third

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[6] The California Supreme Court had prohibited racially motivated peremptory challenges under the California Constitution's right to a jury drawn from a representative cross-section of the community in People v. Wheeler, 148 Cal. Rptr. 890, 899, 903, 910 (Cal. 1978). As was the case in Florida, the procedures endorsed in California were strikingly similar to those adopted in Batson. Id. at 905-06.

element. Further, even if respondent is dissatisfied with this alternative, it can explicitly state it is only providing reasons pursuant to this Court's directive in Antwine and nothing it offers should be construed as a waiver of its right to challenge the existence of a prima facie case.

Moreover, attributing to Hernandez the suggested interpretation is consistent with, and analogous to, the situation in which a party on appeal complains about the admission of certain evidence, but at trial stated it had "no objection" to its admission. When a party engages in the noted actions, it has waived any claim of error on appeal. See, e.g., State v. Myers, 770 S.W.2d 312, 314 (Mo. App., W.D. 1989); State v. Adams, 552 S.W.2d 53, 53-54 (Mo. App., W.D. 1977). When a prosecutor volunteers explanations, he has effectively stated to the trial court he has "no objection" to the defendant having established a prima facie case under Batson.

This Court should not retrench from its Antwine directive when any potential problem of waiver can be avoided by respondent not "volunteering" its explanations and the trial courts of this State being directed to state, on the record, when explanations are being sought to determine whether a prima facie case has been proven. Cf. Green v. State; People v. Benson, supra. This approach is consistent with the Supreme Court's expanded application of Batson in Powers and Edmonson. Moreover, the Antwine

directive facilitates the benevolent purposes of entirely eliminating racial discrimination from the courtroom. See Edmonson, supra.

Although the trial court in State v. Burgess failed to follow the Antwine directive, this Court neither repudiated Antwine's directive nor condoned the trial court for failing to comply with it. This Court simply chose to affirm the trial court's actions because of other factors in the record that it believed militated against finding a prima facie case existed. More particularly, this Court relied on the fact the actual jury was one-third black[7] and both the defendant and the victim were black. State v. Burgess, 800 S.W.2d at 747-48.

This Court should adhere to Antwine's directive because it enhances the reliability of determining whether peremptory challenges are racially motivated. Moreover, it is consistent with state courts implementing procedures which insure the integrity of Batson's purpose of rendering racial discrimination in the courtroom an unsavory relic of the past.

C. A Prima Facia Case Was Established and Even If It Was Not, A Remand Is Needed To Comply With Antwine's Directive

Respondent employed five of its seven peremptory challenges to remove five of the ten eligible black venirepersons (Tr. 94, 110; L.F. 52; See Section 494.480 and

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[7] As discussed infra note 9, the continuing vitality of relying on the fact members of cognizable groups actually sat as jurors is of questionable validity.

Section 494.485, RSMo Cum. Supp. 1991).[8] From the fact respondent removed five of the ten eligible black venirepersons, it follows five of the thirteen who sat (jurors and one alternate) were probably black. Because ten of the eligible twenty-seven venirepersons were black (Tr. 94, 110; See Section 494.480 and Section 494.485, RSMo Cum. Supp. 1991), it therefore follows the seventeen remaining venirepersons were white. Those black venirepersons eligible to sit as jurors or the alternate was 37 percent (10 divided by 27) whereas the white counterpart was 63 percent (17 divided by 27). Respondent exercised 71 percent (5 divided by 7) of its peremptories against black venirepersons but only 29 percent of its peremptories against white venirepersons (2 divided by 7). Thus, although blacks composed 37 percent of those eligible to sit, respondent exercised 71 percent of its peremptories against members of that group. In contrast, while white venirepersons constituted 63 percent of those eligible to sit, respondent only employed 29 percent of its peremptories against members of that race. These disparities alone indicate a prima facia case was established.

Although this Court rejected reliance solely on percentage numerical comparisons when blacks actually served on a jury in State v. Griffin, 756 S.W.2d 475, 482 (Mo. banc

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[8] The Motion for New Trial identifies the stricken black venirepersons as follows: (1) Larry Harris #996; (2) Willa Phillips #158; (3) Keith Buckner #49; (4) Gwendolyn Brown #283; and (5) Cynthia Brown #281 (L.F. 25-26).

1988), cert. denied, 490 U.S. 1113, 109 S.Ct. 3175 (1989), that decision must be reconsidered in light of the Supreme Court's cases subsequent to Batson indicating Batson was intended not only to protect defendants from racial discrimination but also those venirepersons eligible to serve. The Eastern District Court of Appeals in State v. Robinson, 811 S.W.2d 460, 462 (Mo. App., E.D. 1991) indicated cases which have approached Batson challenges, as was done in Griffin, were dealt "a fatal blow" by the Powers decision concern for protecting the rights of eligible racially cognizable venirepersons.[9] In Robinson, the Eastern District went on to conclude that "[u]nless the trial court is clearly convinced of a lack of discriminatory intent" the State should be required to explain the reasons for its strike as required by Antwine. Id. at 462-63. Relying on its decision in Robinson, in a case in which the State exercised five of its six peremptories against black venirepersons, the Eastern District held respondent must give explanations for its peremptory challenges because it will allow trial courts to "be better able to evaluate

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[9] In State v. Robinson, 811 S.W.2d 460, 462 (Mo. App., E.D. 1991), the Eastern District found the Powers decision effectively overruled State v. Crump, 747 S.W.2d 193 (Mo. App., E.D. 1988) to the extent it held a substantial number of blacks on the petit jury precluded a Batson claim. Since this Court adopted the Eastern District's opinion regarding the Batson challenge, in State v. Burgess, 800 S.W.2d 743 (Mo. banc 1990), and the treatment given that claim was premised on Crump, the continuing vitality of Burgess on this issue is subject to question.

Batson claims." State v. Roper, No. 57805, slip op. at 4 (Mo. App., E.D., Jan. 14, 1992).

The fact some eligible black venirepersons actually sat as jurors should not be viewed as undercutting the existence of prima facie case here. Because of the Supreme Court's rationale in Powers and Edmonson, this Court's concern should be whether any peremptory challenges were racially motivated. Cf. State v. Gonzales, 808 P.2d 40, 45 (N.M. Ct. App.), cert. denied, 806 P.2d 65 (N.M. 1991) (pre-Powers and pre-Edmonson decision fact that defendant's racial group is not underrepresented on the jury is not the relevant inquiry instead focus must be whether any challenges were racially based). The fact respondent did not employ all of its peremptories to remove black venirepersons likewise, does not undermine the existence of a prima facie case because the record evidences an inordinate number of strikes were exercised against black venirepersons. Cf. United States v. Alvarado, 923 F.2d 253, 256 (2nd Cir. 1991) (pre-Powers and pre-Edmonson even though the government did not use all its peremptory challenges to remove members of cognizable racial groups such fact did not preclude existence of prima facie case).[10] For these reasons, a prima facie case was

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[10] The Second Circuit's earlier Alvarado decision rejected the Batson challenge on the grounds that a significant number of individuals who were members of the relevant cognizable racial groups had served as jurors and therefore the Sixth Amendment's fair cross-section requirement was satisified. United States v. Alvarado, 891 F.2d 439, 445 (1989). Relying on the fact the fair cross-section command was satisfied, the Second Circuit reasoned a Batson violation could not have occurred. Id. This earlier

established and this case should be remanded directing respondent to tender its reasons for its five peremptory strikes exercised against black venirepersons.

Even if this Court concludes the present record does not contain sufficient matters to establish a prima facie case, this matter should be remanded and respondent directed to furnish its explanations for striking the five black venirepersons. In State v. States, 809 S.W.2d 6, 7 (Mo. App., E.D. 1990), respondent utilized a peremptory strike to remove one of the two eligible black venirepersons. The trial court did not require respondent to furnish its reasons in violation of Antwine. Id. Because the trial court failed to adhere to Antwine's directive, the case was remanded. Id. Similarly, in the present matter, the trial court failed to comply with this Court's directive in Antwine. See, supra, Tr. 94-95. For this reason as well, this matter should be remanded and respondent required to furnish its reasons for the relevant peremptory challenges.

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[10] Cont'd.

Alvarado decision was vacated and remanded in Alvarado v. United States, ___ U.S. ___, 110 S.Ct. 2995 (1990) (per curiam). Before the Supreme Court, the Solicitor General argued the Second Circuit had erred in relying on the fact a significant number of individuals in the relevant racial groups had served as jurors, but certiorari should be denied on other grounds. Id. at 2996. The cause was vacated and remanded for additional consideration in light of the Solicitor General's assertions. Id. Thus, the position of the United States government is even when a substantial number of individuals belonging to a cognizable group sat as jurors that fact does not preclude finding a prima facie case existed.

II.

THE TRIAL COURT PLAINLY ERRED, RESULTING IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE, BY FAILING TO DECLARE A MISTRIAL WHEN THE PROSECUTOR ARGUED VORNELL PARKER SHOULD BE CONVICTED OF POSSESSION OF COCAINE AS HE WAS A DRUG DEALER BECAUSE THIS ARGUMENT DEPRIVED VORNELL OF HIS RIGHT TO DUE PROCESS, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT SUCH ARGUMENT APPEALED TO THE JURY'S PASSIONS AND PREJUDICES AS REFLECTED IN SOCIETY'S SPECIAL DISDAIN FOR DRUG DEALERS AND A CONVICTION FOR POSSESSION OF COCAINE WAS OBTAINED BY THE PROSECUTOR INJECTING HIS VIEW VORNELL WAS A DRUG DEALER. ALTERNATIVELY, IF THIS COURT CONCLUDES SUCH ARGUMENT DOES NOT CONSTITUTE PLAIN ERROR THEN THE MOTION COURT CLEARLY ERRED WHEN IT FOUND VORNELL WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18 OF THE MISSOURI CONSTITUTION, WHEN COUNSEL FAILED TO PRESERVE THIS MATTER FOR REVIEW. A REASONABLY COMPETENT ATTORNEY UNDER SIMILAR CIRCUMSTANCES WOULD HAVE OBJECTED TO THE PROSECUTOR'S ARGUMENT AND PRESERVED THIS CLAIM FOR REVIEW. VORNELL WAS PREJUDICED BECAUSE HAD THE CLAIM BEEN PRESERVED HE WOULD BE ENTITLED TO A NEW TRIAL.

A. Closing Argument - Plain Error Review

During closing argument, respondent urged the jury to convict Vornell Parker of the possession charge because he was a drug dealer. The trial court should have declared a mistrial because the argument deprived Vornell of his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Such argument was intended to appeal to the jury's passions and prejudices to the extent they identify with feelings of outrage surrounding drug dealing and the conviction for a possession offense was obtained by injecting the idea Vornell was a drug dealer.

In closing argument respondent argued as follows:

> MR. NELSON: Thank you, Judge. And as Officers Swederski and Will told you "we had to break the door in with the sledge hammer and the door was not demolished." They go in the house and they see this defendant Vornell Parker running through the house. They are four or five feet behind, Vornell gets to the kitchen and throws down this bag of cocaine behind the refrigerator.
>
> Now, Ms. Davis is going to say why would he do that if a whole herd of police officers are on his tail. The reason the defendant throws this down is because there's other people in the kitchen and he doesn't want to be caught with this stuff and it's not even his house which is very, very convenient. I know you folks picked that up, it's very convenient to be dealing or have drugs outside of your house, not even in your own house it's going to be more harder for the state to prove possession. I would admit that, but the state has proven possession because Officer Will personally saw the defendant in possession of these three bags of cocaine and he threw them down behind the refrigerator and the drugs were seized.

(Tr. 225-26) (emphasis added).

Since respondent's argument was not objected to at trial it is reviewable only for manifest injustice under Rules 29.12 and 30.20. Although the argument was not objected to at trial, it was included as an allegation of error in the motion for new trial (L.F. 27-28). To be entitled to relief under the plain error rule, a defendant must "go beyond a mere showing of demonstrable prejudice to show manifest prejudice affecting his substantial rights." State v. Hornbuckle, 769 S.W.2d 89, 92-93 (Mo. banc), cert. denied, ___ U.S. ___, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989).

The referenced argument urged the jury to convict Vornell of the possession offense because he was a drug dealer. Vornell was not charged with a distribution offense. Instead, respondent elected to proceed on the possession charge, but at the same time respondent sought to obtain a conviction for possession by injecting argument Vornell was a drug dealer. This argument was intended to appeal to the jury's passions and prejudices to the extent they share feelings of outrage towards drug dealers. For these reasons, the trial court should have declared a mistrial and the failure to do so resulted in manifest injustice.

B. Ineffective Assistance of Counsel - Failure to Preserve Closing Argument Claim

If this Court concludes the referenced closing argument did not result in manifest injustice then the motion court clearly erred when it rejected the claim counsel's failure

to preserve this matter for review denied Vornell his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the Missouri Constitution. Appellate review of the overruling of a motion for postconviction relief is limited to determining whether the findings, conclusions, and judgment are clearly erroneous. See Williams v. State, 760 S.W.2d 200, 201 (Mo. App., E.D. 1988). Findings and conclusions are clearly erroneous if the appellate court is left with a definite and firm impression a mistake was made. Williams v. State, 760 S.W.2d at 201 (relying on Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987)).

To establish he was denied effective assistance of counsel a defendant must demonstrate counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances and he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987). Prejudice occurs when there is a reasonable probability but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 94, 104 S.Ct. at 2068, 80 L.Ed. at 698. Reasonable probability constitutes a probability sufficient to undermine confidence in the outcome. Id.

Prior to trial, defense counsel moved to prohibit respondent from adducing evidence or suggesting Vornell was a drug dealer (See Tr. 109)--Additionally, the motion for new trial complains of the fact respondent argued Vornell was a drug dealer (L.F. 27-28). The amended postconviction motion alleged counsel was ineffective for failing to preserve as an allegation of error respondent's improper argument (PCR L.F. 14-15). During the postconviction hearing, counsel indicated she recalled the prosecutor did argue Vornell was a drug dealer but failed to object (PCR Tr. 11, 13). Further, counsel conceded in order for a claim of improper closing argument to be reviewable it must be objected to at trial (PCR Tr. 13). A reasonably competent attorney under similar circumstances would have objected to the noted argument especially when viewed in light of the pretrial motion to exclude any reference to Vornell being a drug dealer and the inclusion as a ground of error in the motion for new trial respondent's improper argument. Vornell was prejudiced because if this claim of error had been preserved, and not subject to plain error review, he would be entitled to a new trial.

Vornell's conviction should be reversed because respondent's closing argument resulted in manifest injustice. In the alternative, if this Court concludes respondent's closing argument did not rise to the level of manifest injustice then counsel was ineffective for failing

to preserve as an allegation of error respondent's improper argument.

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III.

THE TRIAL COURT PLAINLY ERRED, RESULTING IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE, WHEN IT FAILED TO DECLARE A MISTRIAL FOLLOWING A STATEMENT BY VENIREPERSON JOHN SHEPHERD THAT HE HAD BEEN EMPLOYED AT THE WORK-HOUSE FOR NINETEEN YEARS AND THOUGHT HE REMEMBERED SEEING VORNELL PARKER THERE BECAUSE IT DEPRIVED VORNELL OF HIS RIGHT TO DUE PROCESS, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT SHEPHERD'S STATEMENTS INFORMED THE PANEL OF VORNELL'S PRIOR CRIMINAL RECORD A MATTER WHICH IS INHERENTLY PREJUDICIAL. ALTERNATIVELY, IF THIS COURT CONCLUDES THIS MATTER DOES NOT RISE TO THE LEVEL OF PLAIN ERROR THEN THE MOTION COURT CLEARLY ERRED IN FINDING VORNELL WAS NOT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18 OF THE MISSOURI CONSTITUTION. A REASONABLY COMPETENT ATTORNEY UNDER SIMILAR CIRCUMSTANCES WOULD HAVE REQUESTED A MISTRIAL ON THE GROUNDS NOW URGED TO CONSTITUTE PLAIN ERROR. VORNELL WAS PREJUDICED BECAUSE IF THE CLAIM HAD BEEN PRESERVED FOR REVIEW THEN HE WOULD BE ENTITLED TO RELIEF.

A. Venireperson Shepherd's Statement - Plain Error Review

In the course of respondent's voir dire, venireperson John Shepherd, #177 (L.F. 26), stated he had been employed at the work-house for nineteen years and he had seen Vornell Parker there. The trial court should have declared a mistrial following the referenced statement because the statement informed the venire of Vornell's prior criminal history. That statement deprived Vornell of his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution as evidence of prior crimes is inherently prejudicial.

The exchanges in question were as follows:

> MR. NELSON: Okay, thank you. Also indorsed [sic] as witnesses in this case -- I am going to read to you a list of these people's names and ask if you are familiar with anyone of these folks. A person by the name of Reginald Walker, okay, he lives over on North Riverview. Anybody feel they know Reginald Walker on Riverview?
>
> VENIREMEN: No.
>
> MR. NELSON: A Joseph Barnes?
>
> VENIREMEN: No.
>
> MR. NELSON: And a Maggie Barnes.
>
> THE COURT: You've got a response.
>
> VENIREMAN: I may have come in contact with a lot of these people. I have been at the work house for nineteen years. I think I even remember him.
>
> THE COURT: Hold it right there. Just sit down. Do you challenge him?

MS. DAVIS: Can we approach?

THE COURT: All you have to do is say "I challenge him," and that's the end of it.

MS. DAVIS: Challenge.

THE COURT: Sir, stand up. Get your things and go back to the jury assembly -- why don't you go home and report back to the jury assembly room tomorrow morning at 9:30, and tell Harvey that Judge Tillman said not to put you on a criminal jury.

VENIREMAN: All right, sir.

(Whereupon, the following proceedings were held out of the hearing of the jury panel):

MS. DAVIS: Your Honor, at this time I think I have to move for a mistrial because I believe that would comment on my defendant's right to testify.

THE COURT: He didn't say nothing about that. That will be denied. All right you can cover that on voir dire.

(Tr. 13-14).

While counsel requested a mistrial during voir dire on the grounds Shepherd's statements constituted a "comment on [Vornell's] right to testify" (Tr. 14), the motion for new trial asserts a mistrial should have been granted because Shepherd's statements informed the entire venire of Vornell's prior criminal record (L.F. 26). Since the grounds asserted in the motion for new trial differ from those raised at trial this matter is reviewable only under the plain error/manifest injustice standard of Rules 29.12 and 30.20. Once again in order to obtain relief, as a matter of plain error, a defendant must "go beyond a mere showing of demonstrable prejudice to show manifest prejudice

affecting his substantial rights." State v. Hornbuckle, 769 S.W.2d 89, 92-93 (Mo. banc), cert. denied, ___ U.S. ___, 110 S.Ct. 171, 107 L.Ed.2d 128 (1989).

The burden of demonstrating the entire venire was prejudiced by a statement made by a venireperson is allocated to the defendant. State v. Reed, 789 S.W.2d 140, 141 (Mo. App., S.D. 1990). Whether a panel should be dismissed is committed to the discretion of the trial court. Id. When a venireperson makes prejudicial or biased statements disqualification of the entire panel is not required unless those statements "were 'so inflammatory and prejudicial that it can be said that a right to a fair trial has been infringed.'" Id. (quoting State v. Harrell, 637 S.W.2d 752, 757 (Mo. App., W.D. 1982)). See also Smith v. McDonald, 753 S.W.2d 336, 338 (Mo. App., E.D. 1988) (personal injury action). Vornell's right to a fair trial was infringed because venireperson Shepherd informed the venire of Vornell's prior criminal record. Those who served as jurors would not otherwise have learned of Vornell's prior criminal history. Undoubtedly, the benefit sought to be obtained from Vornell not testifying, the jury not learning of his prior criminal record, was rendered meaningless because of Shepherd's statements. Shepherd's statements were so inflammatory and prejudicial a mistrial should have been declared.

B. Ineffective Assistance of Counsel - Failure to Request Mistrial on Grounds of Revealing Prior Criminal Record

If this Court decides the comments of venireperson Shepherd did not result in manifest injustice and a miscarriage of justice then the motion court clearly erred when it overruled the allegation counsel's failure to preserve for review the grounds now advanced for granting a mistrial deprived Vornell of his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the Missouri Constitution. This Court's review is limited to determining whether the motion court clearly erred. Williams v. State, 760 S.W.2d 200, 201 (Mo. App., E.D. 1988). The motion court's Findings and Conclusions are clearly erroneous if this Court is left with a definite and firm impression a mistake was made. Id. at 201 (relying on Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987)).

As already noted, in order for a defendant to establish he was denied effective assistance of counsel he must demonstrate counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances and he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Sanders v. State, 738 S.W.2d 856, 857 (Mo. banc 1987). Again, prejudice occurs when there is a reasonable probability but for counsel's

unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 94, 104 S.Ct. at 1068, 80 L.Ed.2d at 698. Reasonable probability constitutes a probability sufficient to undermine confidence in the outcome. Id.

A reasonably competent attorney under similar circumstances would have requested, during voir dire, a mistrial on the grounds asserted in the motion for new trial - Shepherd's statements informed the other venirepersons of Vornell's prior criminal record. The fact a reasonably competent attorney under similar circumstances would have objected during voir dire on the grounds Shepherd had informed the venire of Vornell's criminal record is evidenced by the fact the motion for new trial included this ground (L.F. 26-27). Moreover, at the postconviction hearing counsel conceded the grounds advanced in the motion for new trial differed from those at trial and thereby resulted in the allegation in the motion for new trial not being preserved for review (PCR Tr. 9-11). Vornell was prejudiced because had the grounds for granting a mistrial, now advanced, and in the motion for new trial, been presented during voir dire he would be entitled to a new trial.

Vornell's conviction should be reversed because the trial court plainly erred when it failed to declare a mistrial when venireperson Shepherd informed the venire of Vornell's prior criminal record. Alternatively, if this

Court concludes the grounds now urged for granting a mistrial did not result in manifest injustice and a miscarriage of justice then this Court should find Vornell was denied his right to effective assistance of counsel when counsel failed to preserve for review the claim related to Shepherd's statements.

CONCLUSION

For the reasons discussed in Points II and III, Vornell's conviction should be reversed and this matter remanded for a new trial. Alternatively, if this Court concludes Points II and III do not warrant reversal then as discussed in Point I this cause should be remanded for a hearing to consider whether respondent employed its peremptory challenges in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and at which respondent shall be required to state its reasons for the five peremptory strikes it exercised against five black venirepersons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1992, two true and correct copies of the foregoing were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

William J. Swift

No. 74517

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

VORNELL PARKER,

Appellant.

Appeal from the Circuit Court of the
City of St. Louis, Missouri
Twenty-Second Judicial Circuit, Division 17
The Honorable Daniel T. Tillman, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for possession of cocaine, §195.020, RSMo 1986, obtained in the Circuit Court of the City of St. Louis and for which appellant was sentenced to seven years' imprisonment. An appeal is also taken from the denial of appellant's motion to vacate judgment and sentence under Supreme Court Rule 29.15. The consolidated appeal was transferred to this Court following opinion in the Eastern District Court of Appeals on order of the Eastern District. Jurisdiction, therefore, resides in this Court. Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Vornell Parker, was charged by information on April 20, 1989, with possession of cocaine, §195.020, RSMo 1986 (L.F. 63-64). Appellant was charged as a prior and persistent offender (L.F. 63-64). The cause went to trial before a jury on December 11, 1989, in the Circuit Court of the City of St. Louis, the Honorable Daniel T. Tillman presiding (Tr. 1).

The sufficiency of the evidence to sustain appellant's conviction is not in dispute. Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following: In mid-February, 1989, Detective Richard Will received information from a confidential informant that appellant and Aaron Parker were storing a large quantity of cocaine at an apartment next door to their residence (Tr. 125). Detective Will reported this information to his supervisor, Sergeant Donald Henderson, who ordered a three week surveillance of the residence (Tr. 113, 126). During the surveillance, police observed appellant visit the residence next door to his apartment several times, carrying a briefcase which the informant had stated appellant used to transfer drugs (Tr. 126).

The police obtained a search warrant, which they executed on March 3, 1989 (Tr. 114, 128). After knocking and announcing their presence at the front door to no response, Detective Will used a sledge hammer to force open the front door (Tr. 115, 152). As the officers entered, they saw appellant running toward the kitchen and several other individuals sitting in the living room (Tr. 116). Detective Will chased appellant, and observed appellant toss a bag

of cocaine behind the refrigerator as he ran through the kitchen (Tr. 131-132). The search revealed a total of three bags of cocaine, approximately 3.36 grams, as well as one bag of baking soda, commonly used to "cut" cocaine (Tr. 116-118, 164-165).

Appellant did not testify but called three other witnesses in his defense, which was a denial that he had possessed any cocaine (Tr. 178-220). At the close of the evidence, instructions and arguments of counsel, the jury found appellant guilty of possession of cocaine (L.F. 30). On February 9,1990, the court sentenced appellant as a prior and persistent offender to seven years' imprisonment (L.F. 23).

On June 18, 1990, appellant filed a pro se motion to vacate judgment and sentence pursuant to Supreme Court Rule 29.15 (P.L.F. 1-8). The court appointed the special public defender to represent appellant on August 6, 1990, and after being granted one extension appellant filed a first amended motion on September 24, 1990 (P.L.F. 10, 12-17). After conducting an evidentiary hearing, the court issued its Findings of Fact, Conclusions of Law, and Decree on November 30, 1990, denying appellant's motion (P.L.F. 26-29). This appeal follows.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT CLEARLY ERR IN OVERRULING APPELLANT'S BATSON MOTION AND IN NOT REQUIRING THE PROSECUTOR TO GIVE EXPLANATIONS FOR HIS PEREMPTORY STRIKES BECAUSE: (1) APPELLANT'S BATSON CLAIM WAS UNTIMELY; (2) APPELLANT FAILED TO MAKE A PRIMA FACIE CASE OF ANY RACIALLY DISCRIMINATORY USE OF PEREMPTORY STRIKES BY THE STATE; AND (3) BATSON V. KENTUCKY PLACES THE BURDEN UPON APPELLANT TO ESTABLISH A PRIMA FACIE CASE BEFORE A BATSON HEARING REGARDING THE REASONS IS NECESSARY; THIS COURT'S DIRECTIVE TO THE CONTRARY IN STATE V. ANTWINE IS ERRONEOUS IN LIGHT OF THE RECENT UNITED STATE SUPREME COURT DECISION OF HERNANDEZ V. NEW YORK.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 697 (1986);

Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991);

State v. Antwine, 743 S.w.2d 51 (Mo. banc 1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1755 (1988);

State v. Price, 763 S.W.2d 286 (Mo.App., E.D. 1988);

State v. Lawrence, 791 S.W.2d 729 (Mo.App., E.D. 1990);

State v. Smith, 791 S.W.2d 744 (Mo.App., E.D. 1990);

State v. English, 795 S.W.2d 610 (Mo.App., E.D. 1990);

Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991);

Edmonson v. Leesville Concrete Co., Inc., ___ U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991);

State ex rel. Riederer v. Coburn, No.

45305 (Mo.App., W.D. December 31, 1991);

Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965);

State v. Smith, 781 S.W.2d 761 (Mo. banc 1990);

State v. Thompson, 627 S.W.2d 298 (Mo. banc 1982);

State v. Flynn, 519 S.W.2d 10 (Mo. 1975);

State v. Caffey, 404 S.W.2d 171 (Mo. 1966);

State v. Burgess, 800 S.W.2d 743 (Mo. banc 1990);

Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967);

Tarrance v. Florida, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed.2d 572 (1903);

State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988), cert. denied, 490 U.S. 1113 (1989);

People v. Hope, 137 Ill.2d 430, 560 N.E.2d 849 (1990);

United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988);

United States v. Cartledge, 808 F.2d 1064 (5th Cir. 1987);

United States v. Love, 815 F.2d 53 (8th Cir. 1987);

People v. Turner, 42 Cal.3d 711, 726 P.2d 102 (1986);

State v. Gonzalez, 206 Conn. 391, 538 A.2d 210 (1988);

State v. Slappy, 522 So.2d 18 (Fla. 1988);

Gamble v. State, 257 Ga. 325, 357 S.E.2d 792 (1987);

Weekly v. State, 496 N.E.2d 29 (Ind. 1986);

State v. Barber, 539 A.2d 76 (R.I. 1988);

Rodgers v. State, 725 S.W.2d 477 (Tex.App. 1987);

State v. Kilgore, 771 S.W.2d 57 (Mo. banc 1989);

State v. Michael Kempker, No. 74009 (Mo. banc February 25, 1992);

Section 546.180.3, RSMo 1986.

II.

THE TRIAL COURT DID NOT PLAINLY ERR BY FAILING TO DECLARE A MISTRIAL, SUA SPONTE, AND BY ALLOWING THE PROSECUTOR TO ARGUE THAT "IT'S VERY CONVENIENT TO BE DEALING OR HAVE DRUGS OUTSIDE OF YOUR HOUSE" BECAUSE SAID STATEMENTS DID NOT IMPROPERLY INFLAME THE JURORS IN THAT THEY WERE REASONABLE INFERENCES FROM THE EVIDENCE WHICH PERTAINED TO THE ISSUE OF APPELLANT'S GUILT OF THE CRIME OF WHICH HE WAS CHARGED. FURTHERMORE, THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 MOTION BECAUSE TRIAL COUNSEL IS NOT REQUIRED TO MAKE MERITLESS OBJECTIONS.

State v. Groves, 646 S.W.2d 82 (Mo. banc 1983);

State v. Clemmons, 753 S.W.2d 901 (Mo. banc 1988), cert. denied, 109 S.Ct. 380 (1980);

Kayser v. State, 784 S.W.2d 820 (Mo.App. E.D. 1990);

State v. Sidebottom, 753 S.W.2d 915 (Mo. banc 1988), cert. denied, 109 S.Ct. 515 (1988);

State v. Driscoll, 711 S.W.2d 512 (Mo. banc 1986), cert. denied, 479 U.S. 922, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986);

State v. Shelton, 779 S.W.2d 614 (Mo.App. E.D. 1989);

State v. McDonald, 661 S.W.2d 497 (Mo. banc 1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1875, 85 L.Ed.2d 168 (1985);

State v. Henton, 753 S.W.2d 19 (Mo.App. E.D. 1988);

Supreme Court Rule 29.12(b);

Supreme Court Rule 29.15.

III.

THE TRIAL COURT DID NOT PLAINLY ERR WHEN IT FAILED TO DECLARE A MISTRIAL, SUA SPONTE, WHEN VENIREPERSON SHEPHERD STATED THAT HE HAD BEEN EMPLOYED "AT THE WORK HOUSE" FOR NINETEEN YEARS AND THOUGHT HE REMEMBERED APPELLANT BECAUSE APPELLANT HAS FAILED TO PROVE THAT SUCH A COMMENT PREJUDICED THE JURY PANEL IN THAT THE COMMENT DOES NOT REFLECT ANY PRIOR CRIMINAL ACTIVITY OF APPELLANT. FURTHERMORE, THE MOTION COURT DID NOT ERR IN DENYING APPELLANT'S RULE 29.15 MOTION BECAUSE TRIAL COUNSEL IS NOT INEFFECTIVE FOR FAILING TO MAKE A MERITLESS OBJECTION OR MOTION.

State v. Cooper, 719 S.W.2d 20 (Mo.App. W.D. 1986);

State v. Shelton, 779 S.W.2d 64 (Mo.App. E.D. 1989);

Clark v. State, 753 S.W.2d 67 (Mo.App. E.D. 1988);

Supreme Court Rule 29.15.

ARGUMENT

I.

THE TRIAL COURT DID NOT CLEARLY ERR IN OVERRULING APPELLANT'S BATSON MOTION AND IN NOT REQUIRING THE PROSECUTOR TO GIVE EXPLANATIONS FOR HIS PEREMPTORY STRIKES BECAUSE: (1) APPELLANT'S BATSON CLAIM WAS UNTIMELY; (2) APPELLANT FAILED TO MAKE A PRIMA FACIE CASE OF ANY RACIALLY DISCRIMINATORY USE OF PEREMPTORY STRIKES BY THE STATE; AND (3) BATSON V. KENTUCKY PLACES THE BURDEN UPON APPELLANT TO ESTABLISH A PRIMA FACIE CASE BEFORE A BATSON HEARING REGARDING THE REASONS IS NECESSARY; THIS COURT'S DIRECTIVE TO THE CONTRARY IN STATE V. ANTWINE IS ERRONEOUS IN LIGHT OF THE RECENT UNITED STATE SUPREME COURT DECISION OF HERNANDEZ V. NEW YORK.

Appellant contends that the trial court erred in overruling appellant's Batson motion and in failing to require the state to give its reasons for making the strikes it did. Appellant requests this Court to remand the case for an evidentiary hearing so that the state can give the reasons for its peremptory strikes (App.Br. 13).

Appellant initially argues that the mere fact that the state used five of its seven peremptory strikes (six plus one alternate) to remove venirepersons who happened to be black is sufficient to establish a prima facie case of discriminatory intent pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 697 (1986). In the alternative, appellant asserts that this Court's decision in State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1755 (1988), requires a remand so that the State's explanations for its use of peremptory strikes can

"be considered as part of evaluating the third element of the prima facie case" (App.Br. 14).

Respondent contends that appellant wholly failed to meet his burden of establishing the existence of a prima facie case. The absence of any record besides the use of five of seven peremptory strikes to remove blacks is insufficient to raise an inference of discriminatory intent. Furthermore, respondent argues that the recent United States Supreme Court decision Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) mandates a clear delineation between a defendant's burden to establish a prima facie case independent of the prosecutor's reasons for his strikes, and the shifting of the burden to the state to rebut the presumption of the prima facie case by coming forward with its explanations. Consequently, nothing requires this Court to remand this case for a Batson hearing regarding the prosecutor's reasons for his use of peremptory strikes.

A. RELEVANT FACTS

After both parties concluded their voir dire of the venire panel, the following exchange occurred:

> THE COURT: May the record indicate that we have qualified the required number for the state?
>
> MR. NELSON: Yes.
>
> THE COURT: For the defense?
>
> MS. DAVIS: Yes, sir.
>
> THE COURT: Okay. To those of you not selected or questioned, would you stand. You stand discharged from further service. I would like to thank you and say that you have assisted in the administration of justice even though you were not selected

to try this case. There will be some other requests. I do hope you have an opportunity of hearing a case. Please, feel good about your service, you have rendered a service second to none.

Would you get your things and go back to the jury assembly room on the 8th floor from whence you cometh. Thanks a lot.

Mr. Dix, give your father my regards.

VENIREMAN DIX: I sure will

THE COURT: The rest of you just relax where you are.

(Tr. 92-93).

* * *

(Whereupon, the following proceedings were held within the hearing of the jury panel).

THE COURT: Okay, relax where you are. The lawyers are going to make their strikes. We are going to keep thirteen and send the rest back over to the jury assembly room.

(Whereupon, the following proceedings were held at the bench out of the hearing of the jury panel):

THE COURT: Okay, how many do we have? We had ten, how many did he take off?

MR. NELSON: Took off five.

MS. DAVIS: Five, that's my count too, Your Honor.

THE COURT: That's left how many?

MR. NELSON: That left five out of the ten.

THE COURT: It's a Missouri case that holds when you have a number in excess of the population ratio it's not necessary to have a hearing, but if you want me to make him state why he took them off I will do so.

MS. DAVIS: This will be the defense's motion for Batson, the defense moves to quash the entire jury panel on the motion for mistrial on the basis of the state using five of its peremptory strikes to strike black jury members on the basis of race alone, in that there were other jurors similarly situated that could have been struck.

THE COURT: Okay, overruled. You think it's necessary to have a hearing?

MR. NELSON: I am not going to make a record unless you require me to, Judge.

(Whereupon, the following proceedings were held within the hearing of the jury panel):

THE COURT: Okay, to those of you in the jury box, everybody listen up. If I call your number, those of you in the jury box, I want you to have a seat in the court room.

(Whereupon, the jury and one alternate were seated).

THE COURT: Would the state look at the jurors in the jury box and the juror seated adjacent thereto. Is that the jury selected to try this case?

MR. NELSON: Yes, it is, Judge.

THE COURT: For the defense?

MS. DAVIS: Yes, it is, Judge.

(Tr. 94-95).

The judge next proceeded to discharge the remainder of the qualified but not selected venire (Tr. 95-96).

As seen above, appellant failed to make a record regarding the defendant's race, the race of the witnesses, the racial makeup of the venire panel or of the petit jury when he raised the Batson challenge. An examination of the Legal File and Transcript reveals

the following: The original venire list contained forty names (L.F. 48-54). Of those, the selection process extended to the thirtieth person, three being excused for cause (L.F. 48-52; Tr. 3-4, 13-15, 47). The petit jury selected consisted of twelve jurors and one alternate (L.F. 47). Consequently, a total of fourteen peremptory strikes were made, or seven strikes by each party (six and one alternate). Except for the reference to five of the state's peremptory strikes being used against blacks, the record is silent regarding race (Tr. 94).

B. TIMING OF THE BATSON CHALLENGE

Respondent initially submits that appellant has waived his Batson claim because it cannot be determined from the record that the claim was raised prior to appellant's use of his peremptory strikes (Tr. 94-95).

In State v. Price, 763 S.W.2d 286, 289, n. 3 (Mo.App. E.D. 1988), the Eastern District Court of Appeals noted:

> The Batson claim is based on the Equal Protection Clause which forbids the State from excluding black persons on the assumption that they will be biased, because the defendant is black. Batson, 476 U.S. at 97, 106 S.Ct. at 1723. It would seem logical, therefore, if the claim is directed toward the State's action, the better time to raise the challenge would be after the State has made, and before the defendant makes, peremptory strikes.
>
> By so doing, if the State has made an improper strike, the trial court could disallow it. The State could then strike another venireperson to complete its peremptory strikes. In this manner, the entire jury panel would not be lost and judicial time would be maximized. Also, defense counsel could still make the defendant's strikes following those of the State, as required by §546.180.3 RSMo 1986.

BEST AVAILAB

Following Price, the Eastern District found that the defendant in State v. Lawrence, 791 S.W.2d 729, 730 (Mo.App. E.D. 1990), had waived his Batson challenge because he had failed to make "any objection at the time the strikes were made" and had further ratified the jury panel after both parties had made their strikes and the remaining venire panel then dismissed. Id. at 730.

Other cases have also cited Price with approval. See State v. Smith, 791 S.W.2d 744 (Mo.App. E.D. 1990), and State v. English, 795 S.W.2d 610 (Mo.App. E.D. 1990). Although the facts of the three later cases in the Eastern District, Lawrence, Smith, and English, involved a defendant who had failed to make the Batson challenge until after the jury was discharged, all three opinions favorably cited the reasoning in State v. Price. Respondent submits that the policy of requiring the trial error to be brought to the trial court's attention "at the earliest possible opportunity" should be applied to the timing of a Batson challenge. State v. English, supra at 612.

After the state has made its peremptory strikes, all the facts and information needed to make a Batson challenge based upon the use of those strikes already exists. All of the relevant factors such as the race of the parties, the race of the stricken venire members, the circumstances of other venire members, and the number of strikes used against a cognizable racial group, are known to all parties and the trial court. Consequently, both judicial economy and the orderly procedure of defense strikes being made after those of the state support a determination that the proper time to raise

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a Batson challenge "would be after the State has made, and before the defendant makes, peremptory strikes." State v. Price, supra.

C. APPELLANT HAS FAILED TO MAKE A PRIMA FACIE CASE

Should this Court conclude the Batson challenge was not timely raised, appellant requests plain error review under Rules 29.12 and 30.20 (App.Br. 21). Therefore, respondent will address the merits of appellant's claim regarding the determination of a prima facie case of discriminatory intent.

A variety of "facts and any other relevant circumstances," Batson, 106 S.Ct. at 1723, have been articulated by both the United States Supreme Court and Missouri courts as factors in raising an inference that the prosecutor has used peremptory strikes to exclude members of the venire on account of their race. In Batson, the Court noted that a "pattern" of strikes against members of a race might give rise to the inference of discrimination. Id. The Court also looked to the prosecutor's questions and statements during voir dire examination to support or refute such an inference. Id. The race of the defendant, the victim and any material witnesses have also been considered. State v. Burgess, 800 S.W.2d 743, 747 (Mo. banc 1990). The racial composition of the qualified panel and of the petit jury that actually heard the case are also relevant. See, e.g. State v. English, supra at 612-613.

An examination of the transcript reveals that appellant failed to make a record regarding any of the above factors, except to note that the state used five of its peremptory strikes to strike black jury members (Tr. 94-95). As the Eastern District Court of Appeals stated:

> The record does not definitively establish the number of blacks who served on the jury. . . . The prosecutor did not utilize all of his challenges to remove blacks, a fact which undercuts an inference of discrimination. The record does not establish the race of the state's witnesses or that any tactical advantage might be perceived to accrue to the prosecution from the removal of members of the black race from the jury. [cite omitted] Defendant did not point out which veniremen were similarly situated to veniremen who had been struck. . . . The defendant did not accept the court's invitation to require explanations. The sole and only basis in the record for defendant's Batson challenge is that the prosecutor utilized five of his six strikes against blacks.
>
> State v. Vornell Parker, No. 58019 (Mo.App. E.D. January 21, 1992), slip op. at 4.

Respondent submits that appellant has wholly failed to make a prima facie case of discriminatory intent in the state's use of its peremptory strikes. As Batson v. Kentucky, supra, mandates, and Hernandez v. New York, supra, reaffirms, the burden of establishing the prima facie case is placed upon the defendant; "it is not unconstitutional, without more, to strike one or more blacks from the jury." Batson, 106 S.Ct. at 1726 (White, J., concurring).

D. VIABILITY OF ANTWINE MANDATE IN LIGHT OF RECENT UNITED STATES SUPREME COURT AND MISSOURI SUPREME COURT DECISIONS

Appellant alternatively argues that this Court should adhere to its directive in State v. Antwine, supra, and require the prosecutor to state the explanations for the state's peremptory strikes before determining whether a prima facie case exists.

Respondent submits that the directive set forth by this Court in Antwine conflicts with Batson, as highlighted by the recent decision of the United States Supreme Court in Hernandez v. New York, supra. As a result of the conflict concerning the relationship between the determination of the existence of a prima facie case and the need for a prosecutor to give explanations for the state's peremptory strikes, respondent is effectively prevented from arguing the absence of a prima facie case. Respondent submits that such a result is directly contrary to the evidentiary formulation first set forth in Batson which places the burden of establishing the prima facie case on a defendant, not on the state.

In Batson, the United States Supreme Court placed the burden upon the defendant to show, based upon patterns of state peremptory strikes, the prosecutor's questions and statements during voir dire, and "all [other] relevant circumstances," a prima facie case of discrimination. Id., 476 U.S. at 96-97. If -- and only if -- a prima facie case was made, the state was required to present racially neutral explanations for its peremptory challenges. Id. 476 U.S. at 97; see also Hernandez v. New York, supra, 111 S.Ct. at 1865-1866. In arriving at its evidentiary formulation, the Court noted that the question of "whether the defendant had met his burden of proving purposeful discrimination on the part of the state" was "at the heart of the portion of Swain v. Alabama [380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)] we reexamine today." Batson, supra, 106 S.Ct. at 1719. "As in any equal protection case, the 'burden is of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of

purposeful discrimination.'" Batson, 106 S.Ct. at 1721, citing Whitus v. Georgia, 385 U.S. 545, 550, 87 S.Ct. 643, 646-647, 17 L.Ed.2d 599 (1967), and Tarrance v. Florida, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903).

There is no question that the court in Batson, while rejecting the "crippling burden of proof" placed upon defendants by judicial interpretations of Swain v. Alabama, placed the burden of establishing a prima facie case squarely on the shoulders of a defendant, as seen by the above quotations. The state was required to come forward with its explanations for challenging jurors only after the burden had shifted to the state to rebut the defendant's prima facie case. Batson, 106 S.Ct. at 1723. As Justice White noted in his concurring opinion:

> The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all.

Batson, 106 S.Ct. at 1726 (White, J., concurring opinion).

In State v. Antwine, supra, however, this Court combined the two steps, holding that the prosecutor's explanations must be examined in determining the existence of a prima facie case:

> As a practical matter, the third element of the prima facie case under Batson . . . requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of

> racially discriminatory use of peremptory challenges. Id. at 64.

Nothing in Batson supports the notion that explanations should be required in evaluating the presence of absence of a prima facie case, and this Court has since acknowledged that it "expanded upon" Batson in so holding, inferably as a matter of economy and convenience in appellate review of these claims. State v. Griffin, 756 S.W.2d 475, 481 (Mo. banc 1988), cert. denied, 490 U.S. 1113 (1989). As a result of the "Antwine rule", prosecutors have been categorically required to give explanations for their peremptory challenges whenever a claim under Batson or Powers was made, and appeals have been remanded for further proceedings when they did not do so. See, e.g., State v. States, 809 S.W.2d 6, 7 (Mo.App. E.D. 1990); State v. Johnson, 744 S.W.2d 879, 880-881 (Mo.App. E.D. 1988).

Respondent's research indicates that Missouri is the only state which has expanded upon the Batson-prescribed methodology and required the trial court to consider the state's explanations prior to determining whether a prima facie case was established. The Illinois Supreme Court recently discussed this issue in People v. Hope, 137 Ill.2d 430, 560 N.E.2d 849 (1990):

> If the State's after-the-fact explanations could simply be added to the balance of otherwise objective circumstances used by the trial court to decide whether a prima facie case has been made, then not only would a defendant's Batson-conferred ability to make such a case be impaired in the first place, but it is also likely that the explanations themselves would be judged less rigorously then if they had to measure up to Batson's standards of specificity and neutrality in order to meet a prima facie

> case already established. Such procedural inversion would distort Batson's meaning.
>
> Most courts appear to approve such a clear delineation of Batson analytical steps as we have just set forth. (See, e.g. United States v. Hamilton (4th Cir. 1988), 850 F.2d 1038, 1040-41; United States v. Cartlidge (5th Cir. 1987), 808 F.2d 1064, 1070; United States v. Love, (8th Cir. 1987), 815 F.2d 53, 54-55; People v. Turner (1986), 42 Cal.3d 711, 719-20, 726 P.2d 102, 106-07, 230 Cal. Rptr. 656, 660-61; State v. Gonzalez (1988), 206 Conn. 391, 395-96, 538 A.2d 210, 212-13; State v. Slappy (Fla. 1988), 522 So.2d 18; Gamble v. State (1987), 257 Ga. 325, 357 S.E.2d 792; Weekly v. State (Ind. 1986), 496 N.E.2d 29, 31; State v. Barber (R.I. 1988), 539 A.2d 76, 77-78; Rodgers v. State (Tex.App. 1987), 725 S.W.2d 477.) Our research discloses only one State in which a different view is taken. (See State v. Kilgore, (Mo. 1989), 771 S.W.2d 57, 62 (citing State v. Antwine, (Mo. 1987), 743 S.W.2d 51, 64 . . .).)
>
> People v. Hope, 560 N.E.2d at 861.

The conflict between the Batson-proscribed methodology and the "expansion" of Batson by this Court in Antwine is highlighted by the recent United State Supreme Court case, Hernandez v. New York, supra. In Hernandez, the defendant raised a Batson objection and the prosecutor gave his explanations for striking the prospective jurors without waiting for a ruling on the prima facie question. Id., 111 S.Ct. at 1864. The principal opinion in that decision noted that the consequence of giving explanations for the peremptory challenges was to waive the issue of whether a prima facie case of discrimination had been made:

> Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of

> whether the defendant has made a prima facie showing becomes moot. Id., 111 S.Ct. at 1866.[1]

As this language indicates, the prosecutor's explanations not only cannot be considered in determining the existence vel non of a prima facie case, as Antwine states, but the very giving of such explanations deprives the state of the opportunity to contest the existence of a prima facie case. Consequently, this Court's "expansion" of Batson effectively eliminates the burden upon the defendant to make some threshold showing of discrimination, and requires the state to prove its innocence in all cases where this issue is raised.

Appellant seeks to limit the application of Hernandez to cases where a prosecutor "volunteers" his explanations before a court has ruled on whether a defendant has established a prima facie case of racial discrimination (App.Br. 26). Appellant seizes upon the language in Hernandez which notes that the "trial court had no occasion to rule" on the prima facie case. Id., 111 S.Ct. at 1866. Appellant overlooks that the next sentence in Hernandez states, "This departure from the normal course of proceeding need not concern us." Id. Hernandez plainly stated that "[o]nce a prosecutor has offered a race-neutral explanation for the

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[1]Although the principal opinion in Hernandez was joined by only four members of the Court, neither the concurring nor the dissenting justices contested the above principle of law, and both took it as given that a prima facie case was presented despite the absence of a showing to that effect by the defendant or a finding by the Court. Id., 111 S.Ct. at 1873-1877.

peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." Id. Similarly, this Court recently applied Hernandez in State v. Michael Kempker, No. 74009 (Mo. banc, February 25, 1992), without making any distinction as to whether the reasons were "volunteered" or pursuant to a court order. Indeed, this Court noted that the trial judge "took the commendable precaution of holding a Batson-type hearing in response to the challenge. The state went forward with justification for its strikes, and so we do not have to struggle with the question of what constitutes a prima facie case." Id., slip op. at 2.

Appellant's argument implies that a defendant may have the benefit of both interpretations. One, pursuant to Antwine, a prosecutor must present the explanations for the state's peremptory strikes before a court can determine whether a prima facie case exists. On the other hand, if a prosecutor goes forward with the explanations, the issue of a prima facie case is no longer relevant. In every case, therefore, a defendant simply has no burden beyond the mere assertion of a Batson challenge. This result is directly contrary to the allocation of the burden upon the defendant to establish a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race as a separate step in the "three-step inquiry" outlined by the United States Supreme Court in Batson and reaffirmed in Hernandez. Batson, supra, 106 S.Ct. at 1723; Hernandez, 111 S.Ct. at 1806.

Respondent submits that this Court should reverse its prior directive outlined in Antwine which requires a court to consider the prosecutor's explanations as part of the determination of a prima facie case, in light of Hernandez v. New York, supra. The unfairness of the reallocation of the burden placed upon the state by the Antwine rule is highlighted by the present case. As previously noted, the record is absolutely silent as to the race of the defendant, the race of the witnesses, the racial composition of the venire and the petit jury. All that is apparent from the present record is that the state used five of its six strikes to strike members of the venire who happen to be black. Should this Court hold that where, as here, the merest hint of the scantest inference of discrimination is sufficient to force the prosecution to produce explanations for its use of peremptory strikes, the burden of establishing a prima facie case will be placed entirely on the state. Such a result is clearly against the mandates of the United States Supreme Court, as articulated in Batson v. Kentucky, supra and Hernandez v. New York, supra.

In light of the above, respondent submits that nothing presented by the case at bar requires this Court to order a remand for the prosecution to state its reasons for the use of its peremptory strikes. In view of the recent United States Supreme Court decision Hernandez v. New York, supra, the Batson-prescribed methodology requiring assessment of a prima facie case to be followed, if established, by assessment of neutral explanations must be strictly followed. The directive articulated by this Court in State v. Antwine, supra, requiring the court to consider the

prosecutor's explanations as part of the determination of a prima facie case, directly conflicts with the principle set forth in Hernandez rendering the issue of a prima facie showing moot should the prosecutor offer race-neutral explanations. Consequently, appellant has failed to establish a prima facie showing of discriminatory intent, and this Court should affirm the trial court's rejection of appellant's Batson challenge.

II.

THE TRIAL COURT DID NOT PLAINLY ERR BY FAILING TO DECLARE A MISTRIAL, SUA SPONTE, AND BY ALLOWING THE PROSECUTOR TO ARGUE THAT "IT'S VERY CONVENIENT TO BE DEALING OR HAVE DRUGS OUTSIDE OF YOUR HOUSE" BECAUSE SAID STATEMENTS DID NOT IMPROPERLY INFLAME THE JURORS IN THAT THEY WERE REASONABLE INFERENCES FROM THE EVIDENCE WHICH PERTAINED TO THE ISSUE OF APPELLANT'S GUILT OF THE CRIME OF WHICH HE WAS CHARGED. FURTHERMORE, THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 MOTION BECAUSE TRIAL COUNSEL IS NOT REQUIRED TO MAKE MERITLESS OBJECTIONS.

In appellant's second point, he alleges that the trial court plainly erred by "failing" to declare a mistrial when the prosecutor argued [appellant] should be convicted of possession of cocaine as he was a drug dealer" (App.Br. 36). He claims that the prosecutor's statements "appealed to the jury's passion and prejudices as reflected by society's special disdain for drug dealers" (App.Br. 36).

Respondent notes that appellant has failed to properly preserve this issue for appellate review by failing to object to the portion of the state's argument he now claims was inflammatory and by failing to include this claim in his motion for a new trial.[2] Therefore, should this Court decided to review this issue,

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[2]Appellant erroneously states that he included this claim as an allegation of error in the motion for new trial (App.Br. 18); the actual allegation of error in appellant's motion stated: "The trial court erred in overruling and denying defendant's objections"
(Footnote Continued)

it is only reviewable for "plain error" under Rule 29.12(b). State v. Sidebottom, 753 S.W.2d 915, 919 (Mo. banc 1988), cert. denied, 109 S.Ct. 515 (1988). Under the plain error standard of review, the error complained of "must impact so substantially upon the rights of [a] defendant that manifest injustice or a miscarriage of justice will result if left uncorrected." State v. Driscoll, 711 S.W.2d 512, 515 (Mo. banc), cert. denied, 479 U.S. 922, 107 S.Ct.329, 93 L.Ed.2d 301 (1986). The burden of demonstrating that the action of the trial court resulted in manifest injustice or a miscarriage of justice is allotted to the defendant. State v. Groves, 646 S.W.2d 82, 83 (Mo. banc 1983).

Moreover, the granting of a mistrial is a drastic remedy, which should only be utilized when there is a grievous error which cannot otherwise be remedied. State v. Shelton, 779 S.W.2d 614, 616 (Mo.App. E.D. 1989). The granting of a mistrial rests largely in the discretion of the trial court since it is in the best position to determine any prejudicial effect from the alleged error. Id.

In addition, a trial court has wide discretion in controlling closing argument, with wide latitude accorded counsel in their summaries. State v. McDonald, 661 S.W.2d 497, 506 (Mo. banc 1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1875, 85 L.Ed.2d 168 (1985). "The prosecutor has the right to argue reasonable

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(Footnote Continued)
to the prosecution's questioning of various defense witnesses (L.F. 27). Obviously, this is a different claim than the one now presented to this Court.

inferences from the evidence which he believes in good faith to be justified." Id.

Furthermore, a conviction will be reversed for improper argument "only if it is established the complained of comments had a decisive effect on the jury's determination." State v. Henton, 753 S.W.2d 19, 20 (Mo.App. E.D. 1988) (citations omitted). Relief should rarely be granted on assertions of plain error as to closing argument. State v. Clemmons, 753 S.W.2d 901, 907-908 (Mo. banc 1988), cert. denied, 109 S.Ct. 380 (1988).

In the case at bar, the evidence showed that Detective Richard Will received information from a confidential informant that appellant was storing large quantities of cocaine at a residence, next door to his apartment (Tr. 125). While conducting surveillance, police observed appellant visit the apartment at 5603 Vera, next door to his apartment, several times carrying a briefcase (Tr. 126). Upon searching the apartment, police discovered three bags of cocaine in appellant's possession, and one bag of baking soda, commonly used to "cut" cocaine (Tr. 116-117, 164-165).

Respondent submits that, from the above evidence, it is clear that the prosecutor could in good faith argue that appellant possessed the cocaine because he was dealing it from the apartment next door to his residence. It was reasonable for the prosecutor to infer from the amount of cocaine, the packaging of the cocaine, the presence of the baking soda, and appellant's conduct, that appellant was a drug dealer.

The prosecutor's argument contained reasonable inferences which were drawn in good faith by the prosecutor from the evidence. the fact that appellant was a drug dealer also helped to explain why he possessed cocaine and to prove that he is guilty of possessing it. Thus, appellant's point must fail.

Appellant's point on appeal also contained a request that "if this Court concludes such argument does not constitute plain error then the motion court clearly erred when it found [appellant] was denied his right to effective assistance of counsel . . . when counsel failed to preserve this matter for review" (App.Br. 36). As set out above, the prosecutor's comments were not improper but rather a reasonable inference from the evidence adduced at trial. "Counsel is not ineffective for failing to make meritless objections." Kayser v. State, 784 S.W.2d 820, 822 (Mo.App. E.D. 1990). Even if a movant succeeds in showing that an objection would have been meritorious, he must also show that the failure to object resulted in a substantial deprivation of the right to a fair trial. Id. Appellant's argument fails on both counts. Consequently, it cannot be said that the trial court clearly erred in denying appellant's claim on this basis, and his second point on appeal should be denied.

III.

THE TRIAL COURT DID NOT PLAINLY ERR WHEN IT FAILED TO DECLARE A MISTRIAL, SUA SPONTE, WHEN VENIREPERSON SHEPHERD STATED THAT HE HAD BEEN EMPLOYED "AT THE WORK HOUSE" FOR NINETEEN YEARS AND THOUGHT HE REMEMBERED APPELLANT BECAUSE APPELLANT HAS FAILED TO PROVE THAT SUCH A COMMENT PREJUDICED THE JURY PANEL IN THAT THE COMMENT DOES NOT REFLECT ANY PRIOR CRIMINAL ACTIVITY OF APPELLANT. FURTHERMORE, THE MOTION COURT DID NOT ERR IN DENYING APPELLANT'S RULE 29.15 MOTION BECAUSE TRIAL COUNSEL IS NOT INEFFECTIVE FOR FAILING TO MAKE A MERITLESS OBJECTION OR MOTION.

In appellant's third point, he asserts that the trial court plainly erred when it failed to declare a mistrial, sua sponte, "following a statement by Venireperson John Shepherd he had been employed at the work house for nineteen years and thought he remembered seeing [appellant] there" (App.Br. 42). Appellant contends that Venireperson Shepherd's statements "informed the panel of [appellant's] prior criminal record" which appellant contends is "inherently prejudicial" (App.Br. 42). Appellant also raises a claim of motion court error for failing to find appellant's trial counsel ineffective in that "a reasonably competent attorney under similar circumstances would have requested a mistrial on the grounds now urged to constitute plain error" (App.Br. 42).

Appellant's first challenge attacks the statement made by Venireperson John Shepherd during voir dire as inherently prejudicial, informing the venire panel of appellant's prior

criminal record. "The trial judge is in the best position to determine the effect on the jury panel of exchanges during voir dire. He therefore has considerable discretion over the process and an appellant court will not interfere unless the record shows a manifest abuse of discretion and a real probability of injury to the complaining party." State v. Cooper, 719 S.W.2d 20, 22 (Mo.App. W.D. 1986); State v. Bannister, 680 S.W.2d 141, 145 (Mo. banc 1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1879, 85 L.Ed.2d 170 (1984).

In the present case, the following exchange occurred during voir dire:

> MR. NELSON: Okay, thank you. Also endorsed as witnesses in this case -- I am going to read to you a list of these people's names and ask if you are familiar with anyone of these folks. A person by the name of Reginald Walker, okay, he lives over on North Riverview. Anybody feel they know Reginald Walker on Riverview?
>
> VENIREMAN: No.
>
> MR. NELSON: And a Maggie Barnes?
>
> THE COURT: You've got a response.
>
> VENIREMAN: I may have come in contact with a lot of these people. I have been at the work house for nineteen years. I think I even remember him.
>
> THE COURT: Hold it right there. Just sit down . . .

(Tr. 13).

Appellant has completely failed to show how he was prejudiced as a result of the venireperson's statement. It is in no way

clear that Venireperson Shepherd was even referring to appellant by his statement as the previous male individual about which the venire was asked was a Joseph Barnes (Tr. 13). In any event, the comment that he came into contact "with a lot of these people" as a result of being "at the workhouse for nineteen years" (Tr. 13), does no more than indicate that this venireperson may have met someone involved in the case in the course of his employment. It does not give raise to evidence of appellant's criminal record.

The present case is similar to State v. Cooper, supra. In Cooper, a member of the venire state that he was a former police officer and that he knew the defendant through his employment. Id. at 22. The defendant's motion for mistrial, based on evidence of other crimes, was overruled. There, as here, "[i]n absence of a more specific description of the circumstances under which the veniremen met [appellant], an equally valid inference may be drawn that the meeting was the product of a non-criminal activity routinely encountered" in the course of employment. Id. at 22. the present case presents an even weaker probability that the conviction of appellant was influenced by the exchange during voir dire as it is not even clear to whom venireperson Shepherd was referring when he made his comment. Consequently, the trial court did not plainly err in refusing to declare the drastic remedy of a mistrial. State v. Shelton, 779 S.W.2d 614, 616 (Mo.App. E.D. 1989).

Appellant next alleges that the motion court clearly erred in denying his rule 29.15 motion on the basis of counsel's failure to request a mistrial during the above-quoted exchange. Trial counsel

is not required to make a frivolous objection or motion. Clark v. State, 753 S.W.2d 67, 69 (Mo.App. E.D. 1988). Consequently, the motion court did not clearly err in failing to find appellant's trial counsel ineffective on this basis. Thus, appellant's final point on appeal is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 74517
	)	
VORNELL PARKER,	)	-
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 17
THE HONORABLE DANIEL T. TILLMAN, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Vornell Parker, the appellant, adopts the Jurisdictional Statement found in the original brief filed in this Court.

STATEMENT OF FACTS

The Statement of Facts contained in the original brief filed in this Court is adopted herein.

POINT RELIED ON

I.

A BATSON CHALLENGE SHOULD BE REQUIRED TO BE MADE BEFORE THE ELIGIBLE VENIREPERSONS ARE DISCHARGED AND THE JURY IS SWORN. IF THIS COURT CHOOSES TO ENDORSE THE VIEW A BATSON CHALLENGE MUST BE ASSERTED PRIOR TO THE DEFENSE EXERCISING ITS PEREMPTORIES EVEN WHEN THE RECORD DOES NOT AFFIRMATIVELY SPEAK TO SUCH A PROCESS THEN THIS COURT SHOULD PRESUME THE CHALLENGE WAS TIMELY. SUCH A PRESUMPTION IS DESIRABLE BECAUSE DOING SO ADVANCES THE POLICY RECOGNIZED IN POWERS AND EDMONSON OF PROTECTING INDIVIDUAL VENIREPERSONS, WHO HAVE NO REALISTIC MEANS FOR VINDICATING THEIR RIGHTS, FROM RACIAL DISCRIMINATION. ADHERING TO ANTWINE'S DIRECTIVE DOES NOT COMPEL RESPONDENT TO WAIVE CONTESTING THE EXISTENCE OF A PRIMA FACIE CASE BECAUSE UNDER HERNANDEZ, WAIVER ONLY OCCURS WHEN EXPLANATIONS ARE VOLUNTEERED. ADDITIONALLY, THIS COURT SHOULD FIND ANTWINE'S DIRECTIVE IS MANDATED BY THE MISSOURI CONSTITUTION'S EQUAL PROTECTION GUARANTEE, ARTICLE I, SECTION 2, WHICH DIRECTS THAT GOVERNMENT'S PRINCIPAL OFFICE AND CHIEF DESIGN IS TO FURTHER THE IDEAL THAT ALL PERSONS ARE CREATED EQUAL AND ARE ENTITLED TO EQUAL RIGHTS AND OPPORTUNITY UNDER THE LAW.

State v. Price, 763 S.W.2d 286 (Mo. App., E.D. 1988);
State v. Smith, 791 S.W.2d 744 (Mo. App., E.D. 1990);
Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364 (1991);
Edmonson v. Leesville Concrete Co. Inc., ___ U.S. ___ 111 S.Ct. 2077 (1991);
State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987);

Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859 (1991);
State v. Griffin, 756 S.W.2d 475 (Mo. banc 1988), cert. denied, 490 U.S. 1113 (1989);
Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986);
Cruzan v. Director, Missouri Department of Health, ___ U.S. ___, 110 S.Ct. 2841 (1990);
New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371 (1932);
People v. Hope, 560 N.E.2d 849 (Ill. 1990);
State v. Kempker, No. 74009 (Mo. banc Feb. 25, 1992);
In re Estate of Danforth, 705 S.W.2d 609 (Mo. App., S.D. 1986);
King v. Swenson, 423 S.W.2d 699 (Mo. banc 1968);
State v. Baker, 524 S.W.2d 122 (Mo. banc 1975);
Mo. Const., Art. I, Section 2;
Developments In The Law The Interpretation Of State Constitutional Rights, 95 Harv. L.Rev. 1324 (1982); and
State Constitutions As Separate Sources Of Fundamental Rights, 35 Rutgers L.Rev. 707 (1983).

ARGUMENT

I.

A BATSON CHALLENGE SHOULD BE REQUIRED TO BE MADE BEFORE THE ELIGIBLE VENIREPERSONS ARE DISCHARGED AND THE JURY IS SWORN. IF THIS COURT CHOOSES TO ENDORSE THE VIEW A BATSON CHALLENGE MUST BE ASSERTED PRIOR TO THE DEFENSE EXERCISING ITS PEREMPTORIES EVEN WHEN THE RECORD DOES NOT AFFIRMATIVELY SPEAK TO SUCH A PROCESS THEN THIS COURT SHOULD PRESUME THE CHALLENGE WAS TIMELY. SUCH A PRESUMPTION IS DESIRABLE BECAUSE DOING SO ADVANCES THE POLICY RECOGNIZED IN POWERS AND EDMONSON OF PROTECTING INDIVIDUAL VENIREPERSONS, WHO HAVE NO REALISTIC MEANS FOR VINDICATING THEIR RIGHTS, FROM RACIAL DISCRIMINATION. ADHERING TO ANTWINE'S DIRECTIVE DOES NOT COMPEL RESPONDENT TO WAIVE CONTESTING THE EXISTENCE OF A PRIMA FACIE CASE BECAUSE UNDER HERNANDEZ, WAIVER ONLY OCCURS WHEN EXPLANATIONS ARE VOLUNTEERED. ADDITIONALLY, THIS COURT SHOULD FIND ANTWINE'S DIRECTIVE IS MANDATED BY THE MISSOURI CONSTITUTION'S EQUAL PROTECTION GUARANTEE, ARTICLE I, SECTION 2, WHICH DIRECTS THAT GOVERNMENT'S PRINCIPAL OFFICE AND CHIEF DESIGN IS TO FURTHER THE IDEAL THAT ALL PERSONS ARE CREATED EQUAL AND ARE ENTITLED TO EQUAL RIGHTS AND OPPORTUNITY UNDER THE LAW.

A. PRESERVATION OF BATSON OBJECTION

This Court should endorse the position that a Batson challenge should be made before the eligible venirepersons are discharged and the jury is sworn. Such a rule allows

trial courts to orderly perform their duties and at the same time insures Batson's beneficent goal of ridding racial discrimination from the courtroom is achieved. Under this approach, if respondent exercises its challenges in a racially discriminatory manner a trial court can prohibit the action. Cf. State v. Price, 763 S.W.2d 286, 289 n.3 (Mo. App., E.D. 1988). On the occasions when respondent does employ its challenges improperly, substitute challenges can be permitted without losing the entire venire, thereby avoiding unnecessarily expending judicial resources. Cf. Id. Finally, by focusing on requiring a challenge to be made before the jury is sworn the problem of respondent being precluded from proceeding, because jeopardy has attached, is avoided. See State v. Smith, 791 S.W.2d 744, 747 (Mo. App., E.D. 1990).

It is asserted the Batson challenge is not properly preserved because "it cannot be determined from the record that the claim was raised prior to appellant's use of his peremptory strikes (Tr. 94-95)" (Resp. Br. 14). If this Court chooses to adopt the view that a Batson challenge must be asserted before the defense exercises its peremptory challenges, when the present record does not affirmatively speak to such a process then this Court should presume there was compliance. Such a presumption is warranted because doing so advances the policy which prompted the decisions in Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364 (1991) and Edmonson v. Leesville Concrete Co. Inc., ___ U.S. ___ 111

S.Ct. 2077 (1991). Those decisions were motivated by the fact that venirepersons who have been stricken because of their race have little incentive to commence civil actions to vindicate their rights. See Powers v. Ohio, 111 S.Ct. at 1373; Edmonson v. Leesville Concrete Co. Inc., 111 S.Ct. at 2087. The record evidences respondent exercised a disproportionate number of its peremptory challenges against black venirepersons who lack any real incentive to challenge their removal as racially motivated in a civil rights action. See App. Br. 31-32 and Reply Br. Appendix. By presuming that the challenge was timely, this Court will insure that it will be determined whether the stricken venirepersons rights were violated.

In support of its preservation argument respondent asserts the record is deficient because the record does not indicate Vornell's race, the race of the witnesses, the racial composition of the venire, and the racial composition of the jury (Resp. Br. 13, 15). Because both Powers and Edmonson, supra, indicate the principles recognized in Batson are intended to protect both eligible venirepersons, as well as the defendant, the fact the record does not explicitly reflect Vornell's race is not significant.[1] For the same reason, the race of the witnesses is of no consequence. The racial composition of both the venire and

[1] Undersigned counsel represented Vornell at the postconviction hearing and a reasonable person who has met Vornell would not dispute the fact he is a member of the black race.

the jury were evident in the record and are contained in the original brief filed with this Court and are summarized in a chart included as an Appendix to this brief. See App. Br. 31-32.

Despite respondent's assertion to the contrary, the Batson challenge was presented "at the earliest possible opportunity". See Resp. Br. at 15. The record indicates the court informed the venire "[t]he lawyers are going to make their strikes." See App. Br. at 16 (relying on Tr. 94). The transcript immediately thereafter reflects a hearing outside the presence of the jury that commenced with the court indicating five of the ten black venirepersons were stricken by respondent. See App. Br. at 16 (relying on Tr. 94). Thus, the present record indicates the Batson challenge was asserted "at the earliest possible opportunity".

B. ANTWINE'S DIRECTIVE AND THE PRIMA FACIE CASE

This Court's decision in State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987) is attacked on the grounds that it compels respondent to waive contesting the existence of a prima facie case under the decision in Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859 (1991) (Resp. Br. at 18). The Court in Hernandez, stated as follows:

> The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us. [Title

> VII discussion omitted.] Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

Hernandez v. New York, 111 S.Ct. at 1866. The departure from the normal course the Court was referencing was the fact that the New York trial court was not required to address the existence of a prima facie case because the prosecutor volunteered his explanations. This interpretation is consistent with Florida appellate decisions that have addressed this problem in the context of interpreting the Florida Constitution's prohibition against racially discriminatory peremptory challenges. See App. Br. at 28-29. Under Antwine's directive, prosecutors do not "offer" race neutral explanations but instead are required to furnish their reasons as a part of the process of determining whether defendants have established the third element of the prima facie case. Cf. Hernandez v. New York, supra. Additionally, this Court's Antwine directive does not involve both the "offer[ing]" of explanations accompanied by the trial court ruling on "the ultimate question of intentional discrimination". Cf. Hernandez v. New York.

According to respondent, under Antwine's directive, there has been a "shifting" or "reallocation" of the burden to it to rebut the prima facie case (Resp. Br. at 11, 24). Rather than shifting or reallocating the burden to

respondent, Antwine has simply made available to trial courts a greater quantum of information for assessing whether a prima facie case has been demonstrated. The directive is consistent with general notions of furnishing decision makers with all available relevant information which will assist them in rendering their decisions.

A related benefit to requiring respondent to furnish its reasons as a part of ruling on the prima facie case is judicial resources are used most effectively and efficiently. In the situation in which an appellate court concludes the trial court erred in not finding a prima facie case was shown, a remand for respondent to furnish its explanations is avoided because the explanations are already included in the record. Additionally, by requiring explanations at trial, the memory problems and possible unavailability of the judge and/or attorneys posed by a remand years later never manifest themselves.

Although this Court has characterized Antwine as having "expanded upon Batson," see State v. Griffin, 756 S.W.2d 475, 481 (Mo. banc 1988), cert. denied, 490 U.S. 1113 (1989), what this Court has mandated is how Batson is to be implemented to prevent it from becoming a charade. In Batson, the Court indicated how its decision should be implemented was committed to the states. See Batson v. Kentucky, 476 U.S. 79, 99 n.4, 106 S.Ct. 1712, 1725 n.4 (1986). Cf. Cruzan v. Director, Missouri Department of Health, ___ U.S. ___, 110 S.Ct. 2841, 2859 (1990) (O'Connor,

J., concurring) ("the more challenging task of crafting appropriate procedures for safeguarding incompetent's liberty interests is entrusted to the 'laboratory' of the States . . . ."") (relying on New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 386-87 (1932) (Brandeis, J., dissenting)). Through Antwine's directive this Court has both implemented Batson and properly assumed the role of acting as a laboratory for how best to achieve Batson's goal of ending racial discrimination in the courtroom. The Antwine directive does not compel respondent to waive challenging the prima facie case because the furnishing of reasons is required and not volunteered. The only possible disadvantage to respondent, created by Antwine, is that reasons which are merely a pretext for racial discrimination are incorporated into the record and therefore are subject to being exposed as pretextual.

While respondent complains it is being disadvantaged through being compelled to waive challenging the prima facie case, it quotes extensively from a portion of People v. Hope, 560 N.E.2d 849 (Ill. 1990), which identified what the Illinois Supreme Court perceived as potential unfairness to defendants when the State furnishes its explanations as a part of determining the existence of a prima facie case (Resp. Br. at 20-21). In Hope, the Illinois Supreme Court was concerned "after-the-fact explanations" could impair the defendant's ability to establish a prima facie case and the explanations would be judged less rigorously if that initial

burden was satisfied. People v. Hope, 560 N.E.2d at 861. The Illinois Supreme Court's observations in Hope, however, were prompted by the problems posed by the State offering its explanations for removing all five eligible black venirepersons during a Batson remand five years after the time of trial. Id. at 854, 856. A Batson remand conducted five years after trial is subject to the potential pitfalls and abuses of affording the government the opportunity to formulate what appear to be facially neutral explanations that in reality mask racial discrimination. This concern was suggested by the Hope Court's characterization of the State's explanations as "after-the-fact". Id. The Hope Court's concerns can never manifest themselves when Antwine is followed because remands are unnecessary and thus there is no opportunity for the government to formulate explanations aimed at disguising racially motivated challenges. Despite its reservations, the Hope Court indicated it did not intend to preclude trial courts from considering "truly contemporaneous explanations" when ruling on whether a prima facie case has been established. Id. at 862.

Respondent cites this Court's recent decision in State v. Kempker, No. 74009 (Mo. banc Feb. 25, 1992) as having "recently applied Hernandez . . . without making any distinction as to whether the reasons were 'volunteered' or pursuant to a court order" (Resp. Br. 23). Missouri courts are allowed to take judicial notice of Missouri laws "which

include opinions of appellate courts, and it is permissible to examine the record resulting in an opinion to ascertain the grounds upon which an opinion is based." In re Estate of Danforth, 705 S.W.2d 609, 610 (Mo. App., S.D. 1986). It is requested this Court judicially notice the record which resulted in its Kempker opinion. After the Batson objection was made in Kempker (Kempker Tr. 52-53), the following occurred:

> THE COURT: Mr. Sterner, do you care to state for the record your reason for using peremptory challenges on Jurors 18, Rostice, and 30, Raye?
>
> MR. STERNER: Yes, I would, Judge.

(Kempker Tr. 53) (emphasis added). The Kempker record indicates respondent's explanations were not given in response to the trial court requiring explanations pursuant to Antwine's directive. Instead, the trial court merely solicited respondent as to whether it would "care to", i.e. choose to, furnish its reasons. Respondent was not directed to provide explanations because they were required by Antwine. Since respondent volunteered its explanations in Kempker this Court's citation of Hernandez there (slip op. 2) is consistent with interpreting Hernandez as holding respondent waives challenging the prima facie case when it volunteers explanations.

In the original brief filed with this Court, it was urged that any concern respondent may have about waiving challenging the prima facie case can be avoided through trial courts stating on the record they are seeking

explanations pursuant to Antwine's directive (App. Br. 29-30). Also, that brief noted that respondent can simply inform the trial court that it is only providing explanations because the trial court has directed it, under Antwine, to do so (App. Br. 29-30). Both the reasonableness of the suggested approach and the fact respondent is already proceeding as suggested is evidenced by how the Batson challenge was addressed in State v. Williams, No. 59906 (Mo. App. E.D.).[2]

In Williams, a record was made both as to which eligible venirepersons were stricken and their race (Williams Tr. 177-79). After a record was made as to those matters, the court directed the prosecutor to furnish reasons for her challenges (Williams Tr. 178-79). In response, the prosecutor asserted a prima facie case had not been demonstrated (Williams Tr. 179). The court, however, indicated that the prosecutor's reasons were to be considered as a part of evaluating the prima facie case (Williams Tr. 179). At that juñcture, the prosecutor informed the court that by furnishing explanations she did not intend to waive challenging the prima facie case (Williams Tr. 179). Next, the prosecutor furnished her explanations for the contested challenges (Williams Tr. 179-80). The court then concluded a prima facie case had not

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[2] In this Court's April 9, 1992 order, leave was granted to file the portion of the Williams transcript dealing with the Batson challenge. Judicial notice of the pertinent portions of Williams is requested. See In re Estate of Danforth, 705 S.W.2d 609, 610 (Mo. App., S.D. 1988), supra.

been demonstrated and the explanations given were not a pretext for racial discrimination (Williams Tr. 180-82).

The trial court and the prosecutor in Williams followed the approach which is now suggested to this Court. The fact the suggested approach is already being employed demonstrates it is reasonable and alleviates any problem with respondent being compelled to waive challenging the prima facie case.

C. THE MISSOURI CONSTITUTION'S EQUAL PROTECTION GUARANTEE

This Court should find that Antwine's directive is mandated by the Missouri Constitution's equal protection provision. The Missouri Constitution, Article I, Section 2 (emphasis added), in relevant part, guarantees the following:

> that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

In contrast, the Fourteenth Amendment to the United States Constitution only provides no state shall "deny to any person within its jurisdiction the equal protection of the laws." The general purpose of the Missouri and Federal equal protection guarantees is to prevent invidious discrimination. King v. Swenson, 423 S.W.2d 699, 705 (Mo. banc 1968) (overruled on limited grounds not relevant here in State v. Baker, 524 S.W.2d 122, 131 (Mo. banc 1975)).

Substituting state for federal constitutional doctrine is viewed as a way to revitalize federalism. See Developments In The Law The Interpretation Of State Constitutional Rights, 95 Harv. L.Rev. 1324, 1329 (1982). Reliance on state constitutions to protect basic liberties is "well-founded in history, logic and the theory underlying our federalist society." Pollock, State Constitutions As Separate Sources Of Fundamental Rights, 35 Rutgers L.Rev. 707, 708 (1983). The Bill of Rights in the United States Constitution establishes a floor for basic human liberty while state constitutions establish a ceiling. Id. One of the factors which is significant in considering whether greater protection should be afforded under a state constitution is the existence of "distinctive provisions of the state constitution that recognize rights not identified in the federal Constitution or that characterize particular rights in a significantly different way . . . ." Developments In The Law The Interpretation Of State Constitutional Rights, 95 Harv. L.Rev. at 1361.

The Missouri equal protection provision characterizes that right in a significantly different manner than the Fourteenth Amendment characterizes the Federal counterpart and is intended to convey greater protection. The Missouri Constitution, unlike the Federal Constitution, mandates that "the principal office" and "chief design" of government is to promote the ideal all individuals are created equal and are endowed with equal rights and opportunity under the law.

That mandate imposes a greater and affirmative obligation on government to rid our society of racial discrimination than the Fourteenth Amendment demands. This Court's Antwine directive promotes the ideals envisioned by the Framers of the Missouri Constitution. By requiring respondent to furnish its reasons for its challenges, in evaluating the prima facie case, trial courts are allowed to have before them all available data that is useful for assessing whether the removal of selected venirepersons is racially motivated and insures greater reliability in those determinations. Because the Missouri Constitution requires more of government than the Fourteenth Amendment, this Court should find Antwine's directive is mandated by Article I, Section 2.

For all of the reasons discussed in the original and reply briefs, this matter should be remanded for a hearing at which respondent is required to explain the use of five of its seven peremptory challenges against black venirepersons.

CONCLUSION

As discussed in the original brief, in Points II and III, Vornell's conviction should be reversed and a new trial ordered. Alternatively, if Vornell's conviction is not reversed, then as discussed in Point I of the original brief and this reply brief, this matter should be remanded for a hearing to determine whether respondent utilized its peremptory challenges in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and at that hearing, respondent should be required to explain its reasons for the five peremptory challenges exercised against black venirepersons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1992, two true and correct copies of the foregoing were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

William J. Swift

APPENDIX

STATE V. VORNELL PARKER

S.CT. NO. 74517

	ELIGIBLE VENIREPERSONS	STATE'S PEREMPTORIES	PERCENTAGE ELIGIBLE	PERCENTAGE STRICKEN
BLACK VENIREPERSONS	10	5	37% (10 ÷ 27)	71% (5 ÷ 7)
WHITE VENIREPERSONS	17	2	63% (17 ÷ 27)	29% (2 ÷ 7)
TOTALS	27	7	100%	100%

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